STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF GRAND FORKS NORTHEAST CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA, BY AND THROUGH THE NORTH DAKOTA STATE BOARD OF HIGHER EDUCATION AND THE UNIVERSITY OF NORTH DAKOTA, Plaintiff, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.	)	Civil No. 18-06-C-01333

DEFENDANT NCAA'S MEMORANDUM IN OPPOSITION

TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Wickham Corwin
CONMY FESTE LTD.
200 Wells Fargo Center
406 Main Avenue
P.O. Box 1686
Fargo, ND 58108-2686
Telephone: (701) 293-9911
Facsimile: (701) 293-3133

Linda J. Salfrank
Jonathan F. Duncan
SPENCER FANE BRITT
& BROWNE LLP
1000 Walnut, Suite 1400
Kansas City, MO 641076
Telephone: (816) 474-8100
Facsimile: (816) 474-3216

Gregory L. Curtner
MILLER CANFIELD
PADDOCK AND STONE PLC
101 N. Main Street, 7th Floor
Ann Arbor, MI 48104
Telephone: (734) 663-2445
Facsimile: (734) 663-8624

Attorneys for Defendant,
National Collegiate Athletic Association

TABLE OF CONTENTS

The National Collegiate Athletic Association ("NCAA") respectfully submits this memorandum in opposition to plaintiff's request for mandatory injunctive relief.

INTRODUCTION

In 2001, representatives of NCAA member institutions began studying the impact of Native American mascots, nicknames and images in intercollegiate athletics. After careful study spanning four years, those representatives concluded that mascots, nicknames and images which stereotype Native Americans were inconsistent with the Constitution of the NCAA and had no place in NCAA championship events. Accordingly, the NCAA, a private voluntary association, adopted a Policy designed to rid its own championship events of hostile or abusive references to Native American culture. It is a non-discrimination Policy. The Policy does not require any college or university to change its mascot, nickname or imagery. The Policy does not prohibit universities with Native American mascots or nicknames from using those references during the regular season or from participating in NCAA championship events.

Over the objection of Sioux Tribes in and around North Dakota, the UND "Fighting Sioux" requested exemption from application of the Policy. The exemption request was presented to three different bodies at the NCAA and denied, each time, with no dissenting votes. Substantial and virtually undisputed evidence supported application of the Policy to UND. Accordingly, UND has been subject to the Policy since its last appeal was denied on April 28, 2006. UND now asks this Court to take the extraordinary step of reversing each of those three decisions and affirmatively granting an exemption from the NCAA Policy. However, instead of addressing the evidence

regarding its use of the "Fighting Sioux" nickname, UND lodges largely technical challenges to the underlying NCAA Policy.[1]

The NCAA acknowledges that reasonable minds differ regarding many NCAA policies and decisions. The NCAA also acknowledges that reasonable minds differ regarding use of Native American nicknames in sports. Nonetheless, UND's legal claims and its demand for mandatory injunctive relief fail as a matter of law and should be denied.

FACTUAL BACKGROUND

I. ORGANIZATION AND PURPOSES OF THE NCAA

The NCAA is a voluntary unincorporated association of over 1,250 members, consisting of colleges and universities, conferences and associations, and other educational institutions. Kupchella Aff., ¶¶ 3-6. Its active members are four-year colleges and universities located throughout the United States. *Id*. The members are divided into Divisions I, II and III for purposes of competition and championships. *Id*.

Among the "Purposes" and "Fundamental Policies" of the NCAA, as set forth in the NCAA Constitution, are the following:

> **1.2 Purposes**
>
> The purposes of this Association are:
>
> a. To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit;
>
> * * *
>
> f. To supervise the conduct of, and to establish eligibility standards for, regional and national athletics events under the auspices of this Association.

[1] Although UND knew on April 28, 2006 that its final appeal was denied, UND waited until October 6 (the first day of UND's Homecoming) to file its lawsuit demanding a preliminary injunction. Because of UND's delay, the NCAA had minimal time to assemble this opposition. UND's late filing created an unnecessary crisis for the NCAA and this Court.

* * *

> **1.3.1 Basic Purpose.** The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

2005-2006 NCAA Division II Manual, 1, attached as Ex. A to UND's Memorandum.[2]

Article 2 of the NCAA Constitution articulates the fundamental principles governing the Association's work in a variety of areas. *Id*. at 3-5. Article 2 provides, in part, as follows:

> **2.4 The Principle of Sportsmanship and Ethical Conduct**
>
> For intercollegiate athletics to promote the character development of participants, to enhance the integrity of higher education and to promote civility in society, student-athletes, coaches, and all others associated with these athletics programs and events should adhere to such fundamental values as respect, fairness, civility honesty and responsibility. These values should be manifest not only in athletics participation but also in the broad spectrum of activities affecting the athletics program.
>
> * * *
>
> **2.6 The Principle of Non-discrimination**
>
> The Association shall promote an atmosphere of respect for and sensitivity to the dignity of every person. It is the policy of the Association to refrain from discrimination with respect to its governance policies, educational programs, activities and employment policies, including on the basis of age, color, disability, gender, national origin, race, religion, creed or sexual orientation. It is the responsibility of each member institution to determine independently its own policy regarding non-discrimination.

In addition to these purposes, the NCAA also organizes and conducts 88 championship competitions (26 in Division I, 25 in Division II and 27 in Division III). *See* UND Ex. A, Bylaws 18.01.1; 18.3. NCAA committees govern the scheduling of the championships (Bylaws 31.1.3,

[2] For the Court's convenience, the NCAA will cite to exhibits or affidavits submitted by plaintiff where possible. Instead of reattaching those materials, the NCAA adopts and incorporates cited exhibits as if set forth fully herein. The NCAA will cite those authorities as "UND Ex. __." Also for the Court's convenience, the NCAA will refer to the Division II Manual submitted by UND. Although it has been replaced by a current Manual, the 2005-2006 Manual is similar in relevant respects.

31.1.4) as well as the site selection (Bylaw 31.1.3.2), team selection (Bylaws 18.4.2, 31.3), playing rules (Bylaws 18.6, 31.1.6), eligibility standards (Bylaws 18.4, 31.2), penalties for misconduct (Bylaw 31.1.8), awards (Bylaw 31.1.10), finances (Bylaw 31.4) and all other matters relating to administration of the championship events. Furthermore, the NCAA owns the intellectual property and media rights connected with all championship events (Bylaws 31.01.1, 31.6).

No member institution has a "right" to host a championship event. Delise O'Meally Affidavit, dated October 31, 2006, ¶ 7. Member institutions bid for the privilege of hosting post-season contests, but have no enforceable expectation that they will be selected. The NCAA alone has the discretion to select championship sites. *Id*.

II. THE NCAA GOVERNANCE STRUCTURE IS REPRESENTATIVE IN NATURE

The NCAA is governed by boards and committees made up of representatives from member institutions. UND Ex. A, Art. 4. Because membership ratification of all governance decisions is highly impractical, the representative boards and committees are given authority by the membership to make decisions and act on behalf of the Association. *Id*. Members of the NCAA national office staff are not voting members of governance bodies. *Id*.

A. The Executive Committee

The Executive Committee oversees Association-wide issues and ensures that "each division operates consistent with the basic purposes, fundamental policies and general principles of the Association." UND Ex. A, Bylaws 4.01.1, 4.1.2. Among other things, the Executive Committee is obligated to "[i]dentify core issues that affect the Association as a whole." *Id*. at Bylaw 4.1.2(d). Having identified such issues, the Executive Committee is also obligated to "[a]ct on behalf of the Association to resolve core issues and other Association-wide matters." *Id*. at Bylaw 4.2.1(e). Among other methods, the Executive Committee takes action by adopting policies. For example, in 2001 the Executive Committee adopted a policy refusing to select NCAA championship (or other

meeting) sites in states which flew the Confederate battle flag. Dr. Walter Harrison Affidavit, dated October 31, 2006, ¶ 10; UND Ex. H, 2.

The NCAA membership crafted this governance structure and empowered the Executive Committee to take action because the membership obviously cannot make or ratify all decisions necessary for operation of the Association. Harrison Aff., ¶ 8. The 16 voting members of the Executive Committee represent the membership of the NCAA and include the following:

- Eight Division I-A presidents or chancellors from the Division I Board of Directors
- Two Division I-AA presidents or chancellors from the Division I Board of Directors
- Two Division I-AAA presidents or chancellors from the Division I Board of Directors
- Two Division II presidents or chancellors from the Division II Presidents Council
- Two Division III presidents or chancellors from the Division III Presidents Council

UND Ex. A, Bylaw 4.1. The four non-voting ex-officio members include the Association's chief executive officer and the chair of each divisional Management Council. *Id*.

To assist in its work, the Executive Committee appointed a Subcommittee on Gender and Diversity Issues ("the Diversity Subcommittee"). Harrison Aff. The charge of the Diversity Subcommittee is to review and provide recommendations to the Executive Committee on student-athlete welfare issues as well as gender, minority and youth issues. *Id*. The Diversity Subcommittee consists of 12 college presidents (four from each Division). *Id*.

B. The Division II Presidents Council

While the Executive Committee oversees activities of the entire Association, each division empowers a body of presidents or chancellors "to set forth policies, rules and regulations for operating the division." UND Ex. A, Bylaw 4.01.1. In Division II, this body is called the Presidents

Council and is composed of presidents or chancellors representing active Division II institutions. *Id*. at Bylaw 4.3.

C. Other Association Committees

In addition to the Executive Committee and the Division II Presidents Council, many other committees implement the directives of Association leadership. UND Ex. A, Bylaw 4.8. Like the Executive Committee and the Division II Presidents Council, these committees are made up of representatives from member institutions or, in some instances, members of the public. *See, e.g., id.* at Bylaws 4.9, 4.11, Art. 21. There are more than 127 standing committees of the NCAA. O'Meally Aff., ¶ 8. While employees of the NCAA national office frequently work with the committees, these employees are not members of the committees and do not vote. *Id.*

Of relevance to this case is the Minority Opportunities and Interests Committee ("MOIC"). The MOIC's purpose is to focus on the education and welfare of minority student-athletes, as well as the enhancement of opportunities for ethnic minorities and women in coaching, athletics administration, officiating and the NCAA governance structure. UND Ex. A, Bylaw 21.2.4. The MOIC consists of 12 members, including six members from Division I institutions, three from Division II institutions and three from Division III institutions. *Id*. One student-athlete from each division also serves on the MOIC. *Id*.

III. AFTER CAREFUL STUDY, THE NCAA EXECUTIVE COMMITTEE ADOPTED A POLICY REGARDING NATIVE AMERICAN NICKNAMES AND IMAGERY

Prior to 2001, many colleges and universities using Native American nicknames and images concluded that such usage was inappropriate. Dr. Bernard Franklin Affidavit, dated October 31, 2006, ¶ 7. Those institutions voluntarily changed to team names and logos making no reference to Native American culture. Examples include, among others, Stanford University (Indians to the Cardinal), Syracuse University (Warriors to the Orange), Miami University of Ohio (Redskins to

Redhawks), Morningside College (Chiefs to Mustangs) and Seattle University (Chieftans to Redhawks). *Id*.

On April 13, 2001, the United States Commission on Civil Rights concluded that use of Native American nicknames and images in sports was "disrespectful," "offensive" and "particularly inappropriate." UND Ex. R, Attach. 13. On April 27, 2001, the NCAA Executive Committee asked the MOIC and the Diversity Subcommittee to review the use of American Indian mascots, nicknames and logos in athletics by member institutions. UND Ex. D. In the four-year period which followed, a number of bodies representing the NCAA membership, the public, student-athletes and Native Americans worked with the Association in studying the impact of Native American images in intercollegiate athletics. *See, e.g.*, UND Ex. E; UND Ex. H, 3.

The MOIC drafted and followed a "Strategic Plan" and "Research Method" which involved gathering data, reviewing historical information and soliciting input from the groups listed above. Und Ex. E. The MOIC also obtained information from administrators, spectators and alumni at institutions which continued to use Native American mascots, nicknames or imagery and at institutions which formerly used such imagery. *Id*. The MOIC reviewed studies, consulted with experts and read more than fifty writings presenting various perspectives on this issue. *Id*.

The MOIC presented its "Report on the Use of American Indian Mascots in Intercollegiate Athletics" to the Executive Committee in October 2002. UND Ex. E. The MOIC reported, among other things, that ninety percent of the comments received from member institutions and the public supported the elimination of American Indian mascots, nicknames, images and logos in intercollegiate athletics. *Id*. The MOIC also forwarded correspondence to over 500 American Indian tribes and councils to obtain their thoughts and comments. *Id*. Ninety-nine percent (99%) of responses in this category requested the NCAA to ban the use of Native American mascots in

intercollegiate athletics. *Id*.[3] Based on its work and the extensive data available, the MOIC concluded that "those aspects that are offensive should be eliminated to ensure that the NCAA's principles of cultural diversity and gender equity, sportsmanship and ethical conduct and non-discrimination are adhered to during all athletic events." *Id*.

The MOIC also concluded that the use of American Indian images in intercollegiate athletics must be a concern of the NCAA. *Id*. Pursuant to Bylaw 4.2.1(e), the Executive Committee had the corresponding duty and responsibility to "act on behalf of the Association" to "resolve core issues and other Association-wide matters." Having identified a core issue through the MOIC and the Diversity Subcommittee reports, the Executive Committee was obligated under the NCAA Constitution to act on behalf of the Association to resolve the issue. UND Ex. A, Bylaw 4.2.1(e).

The same year the MOIC prepared its report, Stephanie Fryberg, Ph.D., of the University of Arizona, independently studied the psychological impact of social representations on Native Americans. She concluded, in part, that exposure to Native American logos or mascots 1) lowers the self-esteem of American Indian students, 2) reduces American Indian students' belief that their community has the power and resources to resolve problems (community efficacy), and 3) reduces the number of achievement-related future goals that American Indian students see for themselves. *See* UND Ex. R, Attach. 14. She also found that while exposure to such social representations lowers self-esteem for American Indian students, it raises the self-esteem of European American students. *Id*. [4]

[3] Dozens of organizations representing Native American interests have opposed the exploitation of Native American images in intercollegiate athletics. Franklin Aff., ¶ 8. These include, among others, the Association on American Indian Affairs, the National Indian Education Association and the National Congress of American Indians. *Id.* This short list does not include dozens of resolutions passed by non-Native groups, individual tribes, inter-tribal councils or countless campus groups asking athletic teams to stop using Native American nicknames and images. *Id*.

[4] Although the NCAA has not had an opportunity to develop this, it appears that numerous studies conducted by UND's own psychology department have independently reached similar conclusions.

Upon completion of the MOIC report, institutions using Native American mascots or references were asked to complete a self-analysis to determine the impact of Native American references on their respective campuses.[5] UND Ex. G, 2. In November of 2004, thirty-three colleges and universities, including the University of North Dakota, were asked to submit further evaluations addressing their use of Native American imagery or references. *Id*. Two on-campus groups at UND disagreed with UND's self-evaluation and submitted a Minority Report dated May 10, 2005. It challenged many portions of the administration's evaluation, and provided much contrary information not contained in that evaluation. A copy of the "Minority Report" prepared by the UND American Indian Services and the Campus Committee for Human Rights is attached hereto as NCAA Ex. 1 (attachments omitted).

Based on the findings of the MOIC and the Diversity Subcommittee, based on its review of the supporting information, and based on the values identified in the NCAA Constitution, the Executive Committee concluded that use of Native American mascots, nicknames and imagery in intercollegiate athletics was a core issue affecting the entire Association. UND Ex. F, 2. Under the NCAA Constitution, it had an obligation to act. UND Ex. A, Bylaw 4.2.1(e). Accordingly, on August 4, 2005, the Executive Committee adopted a policy (the "Policy") regarding the use of such imagery at NCAA championship events. Harrison Aff., ¶ 11; UND Ex. G. The Policy provides as follows:

> Effective February 1, 2006, institutions with hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery will be prohibited from hosting any NCAA national championship competition.
>
> Effective February 1, 2006, institutions with hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery must take reasonable steps to cover those images at any predetermined NCAA championship competition site previously awarded.

[5] By this time, additional institutions had voluntarily changed their nicknames, retired their mascots or otherwise stopped using Native American imagery in connection with their athletic programs. *See, e.g.*, UND Ex. G.

> Effective August 1, 2008, institutions displaying or promoting hostile or abusive racial/ethnic/national origin references on their mascots, cheerleaders, dance teams, and band member uniforms or paraphernalia are prohibited from wearing such material at an NCAA championship site.
>
> Effective February 1, 2006, institutions with students-athletes wearing uniforms or paraphernalia with hostile or abusive racial/ethnic/national origin references must ensure that those uniforms or paraphernalia are not worn during NCAA championship competition.

UND Ex. R, 2.

Neither the NCAA president nor any staff member of the national office voted. Harrison Aff., ¶ 12. The Policy became effective February 1, 2006 (except that portion regarding cheerleaders, dance teams and band members, which becomes effective February 1, 2008). *Id*. ¶ 12. Application of the Policy was stayed during the pendency of appeals for those colleges or universities which sought exemptions. *Id*. ¶ 12; UND Ex. J, 1. All appeals have been resolved. Harrison Aff., ¶ 12.

Within weeks after the NCAA adopted the Policy, the American Psychological Association ("APA") adopted a Resolution concluding, among other things, that "continued use of American Indian mascots, symbols, images, and personalities is an offensive and intolerable practice to American Indian Nations that must be eradicated." UND Ex. R, Attach. 15. The APA Resolution "supports and recommends the immediate retirement of American Indian mascots, symbols, images, and personalities by schools, colleges, universities, athletic teams, and organizations." *Id*. The APA Resolution is consistent with the Policy at issue. *Id*.

IV. AFFECTED INSTITUTIONS WERE AFFORDED SIGNIFICANT PROCESS

Eighteen colleges and universities, out of more than 1,250 members, were subject to the Executive Committee's Policy. UND Ex. G. The Executive Committee adopted a process whereby those institutions could seek relief from application of the Policy through administrative appeals, and

ultimately an appeal to the Executive Committee. UND Ex. H. All impacted institutions were notified of the appeal process by letter dated August 9, 2005, from Dr. Myles Brand, President of the NCAA. UND Ex. J.

Requests for exemption from the Policy were referred to a Staff Review Committee chaired by Dr. Bernard Franklin, NCAA Senior Vice President for Governance and Membership. UND Ex. M. Other members of the Staff Review Committee were senior members of the NCAA national office staff including Wally Renfro (Senior Advisor to the President), Kevin Lennon (Vice-President for Membership Services), Charlotte Westerhaus (Vice-President for Diversity and Inclusion), Bob Williams (Managing Director of Public and Media Relations), Corey Jackson (Interim Director for Diversity and Inclusion) and Delise O'Meally (Director of Governance and Membership). Franklin Aff., ¶ 9. In considering each exemption request, the Staff Review Committee reviewed all facts and other information presented by an institution. *Id*. ¶ 10. In deciding whether an institution should remain subject to the policy, the Staff Review Committee considered each appeal individually and decided each case based on the unique facts and arguments presented. *Id*.

The Staff Review Committee considered "the type of use of mascots, names and/or imagery, including the pervasiveness or degree of the use." UND Ex. R, 5. The Staff Review Committee also considered the impact on members of the campus community, the general public, student-athletes involved in competition, the Native American community as a whole, and local Native American peoples. *Id*. Finally, the Staff Review Committee considered whether a namesake tribe had formally approved use of the mascot, name or imagery by the institution. *Id*.

Staff decisions regarding application of the Policy, if adverse to the institution, could be appealed to the Executive Committee. UND Ex. J, 2; UND Ex. H, 2. To assure peer review, however, the Executive Committee first referred appeals to the respective divisional governance

bodies. UND Ex. J, 2. Therefore, for Division II institutions seeking relief, appeals were first presented to the Division II Presidents Council. *Id*.

V. UND ADMITS ITS USE OF NATIVE AMERICAN REFERENCES IS PERVASIVE

UND is a member of the NCAA, Division II (except for the men's and women's hockey teams, which compete in Division I). Kupchella Aff., ¶¶ 7-8.[6] UND athletic teams are called the "Fighting Sioux." Kupchella Aff., ¶ 15. The logo is a stereotypic image of a Native American male. Hodgson Aff., Ex. A. Although designed by a Native American artist, the artist is not a Sioux. O'Meally Aff., ¶ 9.

Plaintiff admits that the "Fighting Sioux" nickname and related imagery are used extensively and pervasively at UND. Hodgson Aff., Ex. A. In addition to the many uses referenced in UND's motion, the logo is used countless times on the UND campus, the UND website and all types of UND merchandise. *See* University of North Dakota, http://www.und.edu (last visited October 31, 2006). These are just examples of pervasive use by the institution itself.

The logo also appears on team jerseys and other official athletics paraphernalia. According to UND, the logo appears on, among other things, "actual game uniforms, game warm-ups, travel bags, sideline attire, coaches' attire, player equipment, team accessories, cheerleading uniforms, cheerleading accessories (megaphones, banners, etc.), band uniforms and band instruments." Compl., ¶ 76; Buning Aff., ¶ 16. The logo is built into campus facilities. According to plaintiff, the logo is "embedded and prominently featured in nearly every aspect of the architecture and design of the Engelstad Arena." Compl., ¶ 77; UND Mem., pp. 38-39; Hodgson Aff. ¶ 9. The "Fighting Sioux" image appears more than 2,400 times in the Engelstad Arena alone. Hodgson Aff., ¶ 10;

[6] UND recently announced its intention to move all sports to Division I by the 2008-2009 academic year. Accordingly, those UND sports which are not already competing in Division I will not be eligible for championship competition during the transition period. UND Ex. A, Bylaw 18.4.2, 18.5. UND's championship ineligibility during that transition period is unrelated to the Policy at issue in this lawsuit.

Compl., ¶ 77. Many of these images are on floors or carpet where they will be stepped on by visitors and student-athletes. Hodgson Aff., Ex. A. The logo images are also used to mark bathroom facilities. *Id*.

In addition to use by UND, the Sioux name is used by UND alumni groups ("The Fighting Sioux Club"), student groups ("Sioux Crew") and as a promotional or merchandising tool ("Sioux Kids Club," "Fighting Sioux Sports Network," "Sioux Shop," and "Sioux Illustrated Magazine"). *See* University of North Dakota, http://www.undalumni.org (last visited October 31, 2006); University of North Dakota, http://www.fightingsioux.com (last visited October 31, 2006); University of North Dakota, http://www.siouxshop.com (last visited October 31, 2006). The "Sioux Shop" may be contacted at 1-877-91-SIOUX. *Id*. It offers a broad array of merchandise, virtually all of which is emblazoned with the nickname, logo or both. *Id*.

UND also "creatively" uses the tribe name in connection with university fundraising events ("Sioux Boosters," "Sioux-Per Gala" and "Sioux-Per Swing" golf tournaments). *See* University of North Dakota, http://www.undalumni.org (last visited October 31, 2006); NCAA Ex. 2. Even the President of UND used the Tribe name in a "play on words" at the top of his open letter to the NCAA entitled "Why the 'Sioux' May Have to Sue," dated June 7, 2006. A copy of Dr. Kupchella's letter is attached hereto as NCAA Ex. 3; University of North Dakota, http://www.universityrelations.und.edu/logoappeal/ (last visited October 30, 2006).

Regrettably, but inevitably, the nickname and logo are also subjected to blatant misuse by fans and opponents alike. This unsanctioned use can be vulgar and shocking. Examples are attached hereto as NCAA Ex. 4. *See also* University of North Dakota, http://www.und.edu.org/bridges/index2.html (last visited October 30, 2006).

According to UND's Complaint and Motion for Preliminary Injunction, the institution builds a reputation, pursues student-athlete recruits and generates considerable revenue by using the Sioux name and related imagery. According to UND, it has been doing so for "more than 70 years." UND Mem., p. 23; Kupchella Aff., ¶ 16. UND persists with its use despite longstanding objections by numerous area Tribes and campus groups.

VI. AREA SIOUX TRIBES OBJECT TO UND'S USE OF THE "FIGHTING SIOUX" NICKNAME AND LOGO

In addition to objections from nationwide groups representing Native American interests (*see* footnote 3 above), Sioux Tribes in or near North Dakota respectfully voiced their objection to being exploited through athletic nicknames and imagery. Specifically, the following Sioux tribes have officially formalized their unambiguous objection to the "Fighting Sioux" nickname and logo and respectfully requested UND to discontinue use of the name and imagery: Standing Rock Sioux Tribe (Resolution No. 356-92; reaffirmed by Resolution Nos. 078-98 and 438-05), Sisseton-Wahpeton Sioux Tribe (Resolution No. SWST-99-015), Ogala Sioux Tribe (Resolution No. 99-07XB), Cheyenne River Sioux Tribe (Resolution No. 287-97-CR), Yankton Sioux Tribe (letter dated February 19, 1999), Crow Creek Sioux Tribe (letter dated February 18, 1999) and Rosebud Sioux Tribe (letter dated February 16, 1999). *See* UND Ex. R, Attachs. 5-11.

On September 8, 2005, the United Tribes of North Dakota also passed an Intertribal Summit Resolution (No. 05-06) calling on UND to stop using the nickname and logo. *Id*. at Attach. 3. The United Tribes of North Dakota is an association of the five federally recognized Tribes located in North Dakota, including the Spirit Lake Tribe. *Id.* The Board of Directors consists of the Chairman and one council member from each member Tribe. *Id.* Despite a subsequent meeting with officials from the North Dakota University System and UND, on March 3, 2006, the NCAA was informed

that the leaders of the United Tribes continued to be clearly opposed to UND's use of the "Fighting Sioux" nickname and log. A copy of this notification is attached as NCAA Ex. 5, Attach. 1.

Efforts by UND to secure permission from individual Sioux Tribes to use the "Fighting Sioux" nickname and logo have also been unsuccessful. In fact, the Standing Rock Sioux Tribe rejected a recent request that it withdraw prior opposition to the "Fighting Sioux" nickname. NCAA Ex. 6. Instead, the Tribe adopted a very clear Resolution affirming prior Resolutions calling on UND to discontinue use of the nickname and imagery. *Id*.

UND has rejected all pleas by the Sioux Tribes. Rather than discontinuing use of the nickname and imagery, UND has increased exploitation of the Sioux name and imagery in efforts to entertain fans, recruit student-athletes and otherwise raise money. Remarkably, the inability to continue such exploitation without consequences is the "irreparable harm" UND asserts in support of its request for injunctive relief.

VII. NATIVE AMERICAN AND GOVERNANCE GROUPS AT UND OBJECT TO USE OF THE "FIGHTING SIOUX" NICKNAME AND LOGO

On January 12, 2006, the UND University Senate passed a Resolution objecting to the "Fighting Sioux" nickname and calling for President Kupchella "to develop and implement an orderly plan for discontinuing use of the Indian nickname and Indianhead logo." A copy of the Resolution is attached hereto as NCAA Ex. 6, Attach. 2. The University Senate Resolution also stated as follows:

> [R]etirement of the name and log[o] is in accord with requests from eight Sioux nations and several other area tribes, the National Indian Education Association, the North Dakota Indian Education Association, the Minnesota Indian Education Association, the National Congress of American Indians, the American Psychological Association, twenty of UND's Indian-related programs, and dozens of other national, regional and local organizations.

On February 6, 2006, a group of more than 120 UND faculty members signed a letter and Petition to Chancellor Robert Potts stating that retiring the "Fighting Sioux" nickname and logo is

"long overdue." A copy of the letter and Petition are attached hereto as NCAA Ex. 5, Attach. 5. They also stated that "UND's continued use of an American Indian team name and logo has a serious and negative impact on learning . . . ." *Id.*

On March 8, 2006, the UND Indian Association passed UNDIA Resolution GM01-2006. The Resolution called the "Fighting Sioux" nickname and logo "demeaning" and noted that use of the nickname encourages practices that "trivialize our traditions, culture, and spirituality." A copy of the Resolution is attached hereto as NCAA Ex. 5, Attach. 4. The Resolution also noted that "21 American Indian related programs at the University of North Dakota have given their full and unanimous support to discontinue the use of the FIGHTING SIOUX ™ nickname and logo." *Id.*

In addition to clear opposition by these campus groups, the Higher Learning Commission of the North Central Association of Colleges and Schools ("NCA") visited UND as part of a comprehensive re-accreditation process, and registered its concern regarding use of the nickname and logo. A copy of the Report is attached as NCAA Ex. 9. *See also* University of North Dakota, http://www.und.edu/dept/cilt/nca/secure/UNDTRdraftfAssurance.pdf (last visited October 31, 2006). Specifically, the NCA prepared a formal report, concluding that use of the nickname and logo should be discontinued. *Id.* at 21-23. The NCA further noted that the controversy: 1) has a negative impact on the learning environment at UND; 2) adversely affects student participation in the classroom; 3) adversely affects student relationships; 4) encourages disrespectful treatment of some students by other students and by some faculty/staff; and 5) otherwise distracts UND from the business of higher education. *Id.* It concluded by stating, "the University of North Dakota is too good an institution, and its leadership too important to the State of North Dakota, to let this issue continue to weaken its performance and impede its full development." *Id.* at 23.

VIII. THREE NCAA BODIES HEARD AND REJECTED UND'S REQUEST FOR EXEMPTION FROM THE POLICY

On August 30, 2005, UND filed a request that it be exempted from application of the Policy. UND Ex. O. UND had the assistance of counsel in preparing its application (and all subsequent briefs). *Id*. The Staff Review Committee reviewed all materials and arguments submitted by UND. UND Ex. P. After considering the UND appeal and the relevant factors, the Staff Review Committee denied UND's request by letter dated September 28, 2005. *Id*.[7] In its decision letter, the Staff Review Committee concluded that the Policy applies to the "Fighting Sioux" nickname and logo. *Id*. The staff committee repeated that its decision "does not mandate that the university change its nickname or logo." *Id*.

UND appealed the staff decision on November 4, 2005 (UND Ex. Q) and filed additional materials dated December 23, 2005 (UND Ex. S); January 30, 2006 (UND Ex. U); and April 13, 2006 (not included by UND as an exhibit). UND submitted extensive briefing and voluminous attachments in support of its appeal. Among other materials, UND referenced the October 2002 MOIC report in its January 30, 2006 brief and attached it as an exhibit. UND Ex. U, 7 (UND provided the MOIC report to this Court in Ex. E; UND did not reattach it to Ex. U). Although UND now claims to have no knowledge about the data supporting the Policy, UND cited and relied upon the very MOIC report setting forth initial findings about Native American images in college athletics. *Id*.

In addition to UND's extensive briefing, Archie Fool Bear, member of the Standing Rock Sioux Tribe Judicial Committee, faxed a letter to the NCAA on April 26, 2006. A copy of the letter

[7] Actually, the staff committee granted a portion of UND's appeal. UND Ex. P, 2. Specifically, UND asked that it be permitted to host a previously-scheduled regional ice hockey tournament during the Spring of 2006 without covering or removing Native American imagery. The Staff Review Committee granted UND's request regarding the tournament. *Id*.

is attached hereto as NCAA Ex. 7. The letter represented that the "Judicial Committee" of the Standing Rock Sioux Tribe supported UND's use of the "Fighting Sioux" nickname and logo. *Id*.[8]

On April 27, 2006, Ron His Horse is Thunder, Chairman of the Standing Rock Sioux Tribe, sent a letter to the NCAA. NCAA Ex. 6. In his letter, the Chairman clearly stated that the Tribe "maintains its stance opposing the 'Fighting Sioux' athletic nickname and logo used by the University of North Dakota." *Id*. He noted that the April 26 letter from Archie Fool Bear "does not reflect the official position of the SRST" and that the tribal Council rejected Archie Fool Bear's efforts to change the Tribe's official position. *Id*. Attached to the Chairman's letter was a copy of Council Resolution No. 438-05, dated September 15, 2005, which unambiguously reaffirmed the Standing Rock Sioux Tribe's official opposition to the UND nickname and logo. *Id*. Like the Tribe's 1992 Resolution, the 2005 Resolution calls on UND to "discontinue the use of the 'Fighting Sioux' nickname." *Id*.

The Division II Presidents Council reviewed UND's appeal materials on April 27, 2006. UND Ex. F. The issue before the Division II Presidents Council was whether UND presented evidence demonstrating that the Staff Review Committee erred in denying the requested exemption. *Id*. Having reviewed the information submitted, and having deliberated application of the Policy to the "Fighting Sioux," the Presidents Council formulated a recommendation for the Executive Committee. *Id*. Specifically, the Presidents Council recommended, with no dissenting votes, that the Executive Committee affirm the Staff Review Committee decision and deny the appeal. *Id*.

The Executive Committee considered UND's appeal during its April 28, 2006, meeting. *Id*; Harrison Aff., Attach. Like the Division II Presidents Council, the Executive Committee was called upon to determine whether UND demonstrated that the Staff Review Committee decision was

[8] Interestingly, UND makes no mention of this letter in its memorandum and does not include the letter in its exhibits.

contrary to the evidence. Harrison Aff., Attach. The Executive Committee considered all information submitted and voted, with no dissents, to adopt the Division II Presidents Council recommendation, affirm the Staff Review Committee's decision and deny the appeal. *Id*. Specifically, the Executive Committee determined that neither the Staff Review Committee nor the Division II Presidents Council erred in finding the "Fighting Sioux" nickname and logo subject to the Policy. *Id*. The Executive Committee determined that the decisions were supported by substantial evidence. *Id*.

The Executive Committee notified UND of its decision on April 28, 2006, and sent a letter detailing its rationale on or about May 15, 2006. Harrison Aff., ¶ ¶ 22-23. UND Ex. F. The letter addressed UND's arguments and applied the relevant factors to the unique facts of UND's case. *Id*.

On October 6, 2006, UND filed this lawsuit. UND demands reversal of the Staff Review Committee decision, the Division II Presidents Council decision and the Executive Committee decision.

ARGUMENT

I. STANDARD FOR ENTRY OF MANDATORY INJUNCTIVE RELIEF

A preliminary injunction is an "extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original); *Vorachek v. Citizens State Bank of Lankin*, 461 N.W.2d 580, 585 (N.D. 1990) (internal citations omitted).[9] To obtain injunctive relief, a party must demonstrate no adequate remedy at law and irreparable injury. *Nodak Mut. Ins. Co. v. Ward County Farm Bureau*, 2006 ND 60, ¶ 24, 676 N.W.2d 752. *See also* N.D. Cent. Code § 32-06-02 (2005) (providing for issuance of injunctive relief). To obtain a preliminary injunction, a moving

[9] For purpose of this memorandum, the NCAA will assume that North Dakota law applies. However, the NCAA believes Indiana law should apply and reserves the right to assert that argument later in this litigation.

party must demonstrate each of the following factors: (1) substantial probability of succeeding on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on the public interest. *Nodak Mut. Ins. Co.*, at ¶ 24; *Magrinat v. Trinity Hosp.*, 540 N.W.2d 625, 629 (N.D. 1995). If the movant has an adequate remedy in the form of money damages or other relief, a request for a preliminary injunction will ordinarily be denied.[10] *Vorachek*, 461 N.W.2d at 585.

An injunction is generally either prohibitory or mandatory in nature. A prohibitory injunction has "the effect of preserving the status quo" while a mandatory injunction "compel[s] some affirmative act . . . ." *Iowa Nat. Res. Council v. Van Zee*, 158 N.W.2d 111, 115 (Iowa 1968). Mandatory injunctions are not favored in the law because they require the nonmovant to change the status quo. *Viestenz v. Arthur T'ship*, 54 N.W.2d 572, 574 (N.D. 1952). Accordingly, a mandatory injunction will not be granted unless "it clearly appears that it will protect the plaintiff from injury, or afford him positive relief from an injury that he has already suffered." *Holcomb v. Hamm*, 42 N.W.2d 70, 73 (N.D. 1950).

Here, the status quo is that the Policy is in effect and UND's appeals for relief have been denied. UND has been subject to the Policy since April 28, 2006. Harrison Aff., Attach. UND seeks to alter the status quo by having this Court strike the NCAA Policy, change NCAA decisions applying the Policy and affirmatively grant UND an exemption. Great caution is warranted in considering such drastic and disfavored relief.

[10] For the reasons set forth herein, UND is not entitled to injunctive relief. If, however, the Court finds that UND is entitled to such relief, it should require UND to post a substantial bond. N.D. Cent. Code § 32-06-05 (2005) (providing that absent a controlling statute, and upon issuance of an injunction, "the court or judge shall require a written undertaking on the part of the plaintiff"); *see also Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 139 (N.D. 1979) (recognizing that furnishing security is "mandatory"). Even UND recognizes the bond requirement under North Dakota law. *See* Mot. for Prelim. Inj., 83 n. 38.

II. UND CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON ITS BREACH OF CONTRACT CLAIM (COUNT I)

Rather than address its use of the Sioux name over objections from the Sioux people, UND lodges largely technical attacks against underlying NCAA procedures. UND ignores the harms resulting from 70 years of competing as the "Fighting Sioux" and complains that adoption of a narrowly-tailored anti-discrimination Policy constitutes a breach of its contractual expectations. The claim fails.

A. UND Cannot Show a Breach

Rather than complying with a non-discrimination Policy, UND challenges the process used in adopting the Policy. UND argues that the Executive Committee's "attempt to ban the use of Native American imagery by the NCAA's member institutions" constituted an "end run" around the Division II Manual. UND is wrong on both accounts.

First, the Executive Committee did not attempt to ban – and did not ban – the use of Native American imagery at member institutions. Instead, consistent with the principle of institutional autonomy, the Policy is narrowly tailored to govern only the NCAA's own championship contests. The Policy extends no further than that. UND received notice of this in President Brand's August 2005 letter (UND Ex. J, 2) ("Choosing a sports team mascot is inherently an institutional decision") and UND has been reminded many times since then (UND Ex. P, 2) ("The decision of the staff review committee does not mandate that the university change its nickname or logo"). *See also*, UND Ex. R, 1; UND Ex. T, 1. The Policy does not and cannot dictate what nicknames or images member institutions employ for purposes outside of NCAA championships. The Policy merely assures that NCAA championship environments, over which it has responsibility and control, are free of racial exploitation and degrading nicknames/images. The Policy is intentionally drafted to

govern only those contests over which the NCAA exercises responsibility. UND's mischaracterization of the Policy's scope should be disregarded.

Second, the Policy at issue is not an "end run" around the legislative provisions of the Division II Manual. Neither was its promulgation a breach of any purported agreement with UND. Instead, the Executive Committee acted within express authority assigned to it by the membership when it adopted the Policy at issue.

Under the NCAA Constitution, one of the Executive Committee's obligations is to "[i]dentify core issues that affect the Association as a whole." UND Ex. A, Bylaw 4.1.2(d). In April of 2001, after the United States Commission on Civil Rights called for an end to all Native American references in athletics, the NCAA Executive Committee asked the MOIC and the Diversity Subcommittee to review the use of American Indian mascots, nicknames and logos by member institutions. UND Ex. R, Attach. 13; UND Ex. D. After conducting a preliminary review, the MOIC concluded, and reported to the Executive Committee, that the use of American Indian images in intercollegiate athletics must be a concern of the NCAA. UND Ex. E.

Pursuant to Bylaw 4.2.1(d), the Executive Committee satisfied one of its responsibilities by identifying a core issue affecting the Association. Pursuant to Bylaw 4.2.1(e), the Executive Committee had the corresponding duty to "act on behalf of the Association" to "resolve core issues and other Association-wide matters." Having identified a core issue through the MOIC and the Diversity Subcommittee reports, the Executive Committee was obligated under the NCAA Constitution to act on behalf of the Association. It did so. As it did in connection with the Confederate battle flag, the Executive Committee acted in furtherance of the Association's commitment to non-discrimination, respect and civility. Harrison Aff. That UND does not agree

with the resulting Policy does not mean the Executive Committee exceeded its authority or breached any contractual duty to UND.

Rather than breaching any purported agreement with its membership, the Policy at issue fulfilled the Executive Committee's obligation to the membership. The Policy furthers the fundamental purposes and core principles of the NCAA member institutions. UND Ex. A. It also furthers the interests of the NCAA membership in non-discrimination, respect and civility. *Id*. Indeed, failing to take action based on the information presented would have frustrated the expectations of member institutions. In the absence of a breach, UND cannot show a likelihood of success on Count I. Accordingly, an award of injunctive relief would be improper.

B. North Dakota Courts Defer to Association Rules and Decisions

Count I also fails because, although pleaded in contract, it is properly viewed as a judicial challenge to an Association policy which UND dislikes. However, it is clear in North Dakota that courts are reluctant to interfere with the policies of a voluntary association or review the wisdom of an association's rules. Specifically, the Supreme Court of North Dakota stated "Court decisions have established that voluntary associations have the power to adopt reasonable bylaws and rules which, if not in violation of a law or public policy, will be binding upon their members." *Crandall v. North Dakota High Sch. Act. Assoc.*, 261 N.W.2d 921, 925-26 (N.D. 1978). The Court went on to quote, with favor, the following language regarding deference to associations' policies:

> Constitutional provisions, bylaws, rules, and regulations of voluntary associations will be deemed to be valid and binding upon members consenting thereto so long as they are not immoral, unreasonable, contrary to public policy, or in contravention of the law of the land. Members may adopt and enforce any just, fair, and reasonable rules and regulations that may be needed to promote harmony among themselves and advance the best interests of the association, although the effect may be to limit the freedom of action that they would enjoy if they were not connected with the association.

Id. (quoting 6 Am. Jur. 2d, Associations and Clubs, Section 6).

The North Dakota Supreme Court also adopted "well-established authority" and held that "it is the duty of the courts, regardless of personal views or individual philosophies, to uphold regulations adopted by administrative authorities unless those regulations are clearly arbitrary and unreasonable." *Id*. (*quoting Brown v. Wells*, 288 Minn. 468, 181 N.W.2d 708, 711 (1970)). The Court added "we do not believe that this Court should determine the wisdom of such rules when they are reasonable and when they accomplish the legitimate purpose for which they were promulgated without being discriminatory." *Id*. (*citing Bruce v. South Carolina High Sch. League*, 258 S.C. 546, 189 S.E.2d 817, 819 (1972)).

The judiciary's noninterference with policies of voluntary associations is consistent with the law in other jurisdictions throughout the United States. *See, e.g.*, *Butler v. NCAA*, 2006 WL 2398683 at *4 (D.Kan. 2006) ("It is in the public interest to allow voluntary athletic associations to determine and enforce their rules without judicial interference"); *NCAA v. Yeo*, 171 S.W.3d 863 (Tex. 2005); *Jones v. NCAA*, 679 So.2d 318 (La. 1996); *Cole v. NCAA*, 120 F. Supp. 2d 1060, 1072-73 (N.D. Ga. 2000) ("the NCAA's rules and decisions regarding the concerns and challenges of student-athletes are entitled to considerable deference and this court is reluctant to replace the NCAA subcommittee as the decision-maker"); *Shelton v. NCAA*, 539 F.2d 1197, 1198 (9th Cir. 1976) ("[I]t is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rules"); *Jones v. Wichita State Univ.*, 698 F.2d 1082 (10th Cir. 1983); *NCAA v. Gillard*, 352 So.2d 1072, 1083 (Miss. 1977) ("courts cannot 'make rules' to govern amateur athletics"); *State ex. rel. National Junior Colleges Ath. Assoc. v. Luten*, 492 S.W.2d 404, 407 (Mo. App. 1973) (courts do not have power to usurp the function of an athletic association); *Justice v. NCAA*, 577 F. Supp. 356, 372 (D. Ariz. 1983) ("[I]t is not [the Court's] task to evaluate the relative efficacy of the particular means chosen by the NCAA to achieve its objectives").

Noninterference with private associations' policies is a strongly-worded doctrine in virtually every jurisdiction because significant harm could result from judicially-imposed modifications to an association's policies. In addition to superimposing the judiciary's opinion over the association's discretion, it also 1) deprives the association of the opportunity to set its own direction, and 2) moots internal procedures available for dissenting members. Judicial interference also prohibits the association from interpreting its fundamental purposes and taking action in furtherance of its core principles. An association is and should be free to set policy based on its interests and expertise, regardless of whether the judiciary would act similarly under the circumstances. Deference to an association with expertise is appropriate and is clearly recognized in North Dakota law. Noninterference is especially appropriate where the limited subject matter of the Association is regulating extracurricular athletic events. Despite UND's various characterizations of the claim, this is a case about regulation of intercollegiate amateur sports, specifically championships.

Here, the NCAA adopted a Policy through its representative governance structure. Consistent with *Crandall*, the Policy 1) is reasonable, and 2) accomplishes its purpose without being discriminatory. *See Crandall*, 261 N.W.2d at 926. The Policy is reasonable because it only applies to member institutions and only applies to championship events owned, organized and operated by the NCAA. Rather than unreasonably dictating how individual campuses operate, the NCAA's Policy simply seeks to control environments at its own championship events. The NCAA has – and must have – this authority. The Policy is also reasonable because it is based on an extensive, well documented and virtually uncontroverted body of research and data.[11]

The Policy plainly furthers the fundamental purposes of the NCAA membership as set forth in the NCAA Constitution by taking reasonable steps to assure that championship environments are

[11] Contrary to UND's disingenuous argument, promulgation and application of the Policy are not based on a single academic study. The Policy and its application are based on substantial data described elsewhere in this opposition. *See also*, UND Ex. E; UND Ex. R, Attach. 15.

free of images which are hostile, abusive or degrading to a large portion of the population. UND has not shown that these basic steps to assure this elementary goal are somehow unreasonable. Rather, President Kupchella said the action "was, no doubt, a well-intentioned policy." UND Ex. O, 6 (complaining only that it "was inappropriately applied to us"). That UND has now identified other procedural means of reaching the same goal does not render the NCAA's action a breach of contract.

UND also has not shown that the Policy is discriminatory. Rather than being discriminatory, the Policy rids NCAA championship events of inherently discriminatory references or images. It is designed to further, and does further, the NCAA's Principle of Non-Discrimination. Harrison Aff., ¶ 13. A less discriminatory policy would be difficult to imagine.

UND is asking this Court to supplant its judgment for that of the NCAA membership representatives who are, by virtue of their professions, more closely attuned to the concerns and challenges of intercollegiate athletics. UND clearly disagrees with the Policy. However, UND's displeasure with the Policy does not render adoption of the Policy a breach of any contract. Neither does it support the dramatic demand that this Court review NCAA policies and strike those portions to which a member takes exception. *See Brookins v. Wissota Promoters Assoc., Inc.*, 142 F. Supp. 2d 1149, 1153 (D.N.D. 2000) ("the court should not be the supermoderator of racing equipment disputes").

The NCAA respectfully submits that according to sound public policy and clear law in this State, the NCAA's policy actions are entitled to considerable deference. Even if this Court or UND would have resolved the issue differently, the NCAA's adoption of a Policy it believes furthers the fundamental purposes of its members is entitled to deference, and cannot constitute a breach of contract. The judiciary should not replace the NCAA Executive Committee as the decision-maker on issues of fundamental policies affecting the Association. UND provided no persuasive reason

why this Court should assume that role and the invitation to do so, under the guise of a contract claim, should be declined.

Without demonstrating any breach by the NCAA or any reason to vacate a private Association's non-discrimination Policy, plaintiff cannot show a probability of success on Count I. The request for mandatory injunctive relief should be denied accordingly.

III. UND CANNOT SHOW A LIKELIHOOD OF SUCCESS ON ITS GOOD FAITH AND FAIR DEALING CLAIM (COUNT II)

Relying on an implied duty of good faith and fair dealing, UND also attacks the NCAA decisions *applying* the Policy. *See* Compl. Count II. However, UND cannot demonstrate any likelihood of success on its quasi-contract claim.

A. North Dakota Does Not Imply a Duty of Good Faith and Fair Dealing Into Every Contract

UND states that inherent in every contract is an implied duty of good faith and fair dealing. UND Mem., p. 55, n.17. UND cites no North Dakota case supporting the legal assertion. In fact, there is no case supporting the assertion. Rather, the North Dakota Supreme Court has consistently declined to read an implied duty of good faith and fair dealing into traditional contracts. *See, e.g., Dalan v. Paracelsus Healthcare Corp. of North Dakota, Inc.*, 2002 ND 46, ¶ 11, 640 N.W.2d 726, 731 (N.D. 2002) and cases cited therein. In *Dalan*, the Court declined to recognize an implied covenant even where there was an express contract between the parties to provide services for a specific duration. *Id*.

Here, there is no basis in North Dakota law to imply a covenant of good faith and fair dealing. *Id*. UND notes the UCC's implied covenant in contracts for the sale of goods, but does not argue that its relationship with the NCAA is governed by the UCC. Obviously it is not. At this preliminary stage of litigation, UND must make a clear showing that it will likely succeed on the merits of its claim. Because no existing North Dakota authority supports the existence of an implied

covenant, UND cannot make a requisite showing in Count II to support entry of the requested injunction. UND simply cannot show a likelihood of success, at this stage, on a claim which is not recognized by the North Dakota Supreme Court. Its motion should be denied on this basis alone.

B. The NCAA Decisions at Issue are Supported by Substantial Evidence

Even if Count II asserted a recognized claim, UND cannot show a likelihood of success. Although disguised as a quasi-contract claim, in reality UND simply argues that the NCAA was arbitrary or capricious in its promulgation and application of the Policy.

In North Dakota, "a decision is not arbitrary, capricious or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation." *Burlington Northern and Santa Fe Railway Co v. Benson Cty Water Resource Dist..,* 2000 ND 182, ¶ 5, 618 N.W.2d at 157; *Ames*, 502 N.W.2d at 851.[12] If this Court were inclined to exercise "arbitrary and capricious" review of NCAA decisions applying an NCAA Policy, this Court need not relitigate UND's waiver request. The Court need not put itself in the shoes of the NCAA governance structure or decide how it believes the Policy should be drafted or how the UND request should have been ruled. Rather, this Court need only review the decisions of the Staff Review Committee, the Division II Presidents Council, and the NCAA Executive Committee, and determine whether there was evidence before those bodies to support the decisions.

The decisions at issue are reasonable applications of a Policy based on overwhelming and virtually undisputed facts. Specifically, the facts before the various NCAA bodies provided ample support for the Policy and for the conclusion that UND's "Fighting Sioux" nickname and logo

[12] Arbitrary and capricious claims are most often reserved for decisions of the government or a political subdivision of the state. *See, e.g., Burlington Northern and Santa Fe Railway Co. v. Benson Cty Water Resource Dist.*, 2000 ND 182, 618 N.W.2d 155; *Ames v. Rose Township Board of Township Sup's*, 502 N.W.2d 845 (N.D. 1993). Even the language of the standard shows that such review is best reserved for oversight of government actions.

should not be exempted from the Policy. These facts demonstrated significant national, local and campus opposition to exploitation of Native Americans in athletics. The facts also demonstrated that the relevant groups found UND's nickname and imagery to be hostile or abusive, as well as pervasive. These facts included, among others, the following:

National Studies

1. On April 13, 2001, the United States Commission on Civil Rights concluded that use of Native American nicknames and images in sports was "disrespectful," "offensive" and "particularly inappropriate." UND Ex. R, Attach. 13.

2. In October 2002, the MOIC reported that ninety percent of comments received from member institutions and the public supported elimination of American Indian mascots, nicknames, images and logos in intercollegiate athletics. UND Ex. E.

3. The MOIC also reported that ninety-nine percent of responses from American Indian tribes requested the NCAA to ban the use of Native American mascots and images in intercollegiate athletics. *Id*.

4. Also in 2002, Stephanie Fryberg, Ph.D., independently studied the psychological impact of social representations on Native Americans and found the impact to be detrimental. UND Ex. R, Attach. 14.

5. On October 18, 2005, the American Psychological Association ("APA") adopted a Resolution firmly stating that Native American imagery in athletics has a profoundly negative impact on Native Americans' self image and overall psychological health. *Id*. at Attach. 15. The APA called continued use of Native American symbols and images in athletics "an offensive and intolerable practice" which "must be eradicated." The Resolution is supported by references to more than thirty (30) studies. *Id*.

Area Sioux Tribes

6. On December 3, 1992, the Standing Rock Sioux Tribe adopted Resolution No. 356-92. UND Ex. R, Attach. 5. The Resolution stated that UND's "continued use of the 'Fighting Sioux' nickname places Native Students in the position of being mascots" and subjects those students to "racially insensitive actions . . . ." *Id*. The Resolution also called on UND to "discontinue the use of the 'Fighting Sioux' nickname." *Id*.

7. On September 15, 2005, the Standing Rock Sioux Tribe adopted Council Resolution No. 438-05. The Resolution affirmed the 1992 Resolution and called on UND to "discontinue the use of the 'Fighting Sioux' nickname." NCAA Ex. 6.

8. On April 27, 2006, the Standing Rock Sioux Tribe re-confirmed that the tribe "maintains its stance opposing the 'Fighting Sioux' athletic nickname and logo used by the University of North Dakota." *Id*.

9. On September 8, 2005, the United Tribes of North Dakota adopted Intertribal Summit IX Resolution No. 05-06. UND Ex. R, Attach. 3. That Resolution, passed with no recorded opposition, stated that "the continued use of the 'Sioux' nickname by the University of North Dakota allows an atmosphere of hostility to exist on the campus toward Native Americans who attend the University of North Dakota . . . ." *Id*.

10. On March 3, 2006, the United Tribes of North Dakota affirmed that its opposition to the 'Fighting Sioux' nickname and logo had not changed as a result of meeting with UND officials. NCAA Ex. 5, Attach. 1.

11. On February 12, 1999, the Sisseton-Wahpeton Sioux Tribe adopted Tribal Council Resolution No. SWST-99-015. UND Ex. R, Attach. 6. The Resolution officially requests the President of UND to ban use of the "Fighting Sioux" nickname. *Id*. In a cover letter to the UND president, Tribal Chairman Andrew Gray, Sr., stated that "use of a race of people as a nickname or mascot is totally unacceptable and only leads to the dehumanization of their Being, Culture, History and Children." *Id*.

12. On February 12, 1999, the Oglala Sioux Tribe adopted Resolution of the Executive Committee No. 99-07XB. UND Ex. R, Attach. 7. The Resolution calls upon UND to "discontinue the use of 'Fighting Sioux' nickname." *Id*.

13. On October 8, 1997, the Cheyenne River Sioux Tribe adopted Resolution No. 287-97-CR. UND Ex. R, Attach. 8. The Resolution stated that use of the "Fighting Sioux" nickname at UND "is demeaning and derogatory to the Lakota Nation." *Id*. The Resolution then called upon UND "to do the moral honorable thing, by removing and discontinuing use of the mascot name 'The Fighting Sioux'." *Id*.

14. On February 19, 1999, Stephen Cournoyer, Chairman of the Yankton Sioux Tribe, sent a letter to the UND president stating that "people and our culture should not be degraded" and calling on UND to change its "Fighting Sioux" nickname. UND Ex. R, Attach. 9.

15. On February 18, 1999, Harold Miller, Chairman of the Crow Creek Sioux Tribe, sent a letter to the president of UND opposing use of the "Fighting Sioux" nickname and requesting UND to stop use of the nickname immediately. UND Ex. R, Attach. 10.

16. On February 16, 1999, Norman Wilson, President of the Rosebud Sioux Tribe, sent the UND president a letter saying that he was "saddened and deeply concerned about the continued use of the 'Fighting Sioux', as it mimics and shows complete disrespect for the Sioux Tribe." UND Ex. R, Attach. 11. President Wilson "strongly urge[d]" UND to cease using the "Fighting Sioux" nickname. *Id*.

UND Student and Faculty Groups

17. On January 12, 2006, the UND University Senate passed a resolution objecting to the "Fighting Sioux" nickname and calling for President Kupchella "to develop and implement an orderly plan for discontinuing the use of Indian nickname and Indianhead logo." NCAA Ex. 5, Attach. 2. The University Senate Resolution also stated as follows:

> [R]etirement of the name and log[o] is in accord with requests from eight Sioux nations and several other area tribes, the National Indian Education Association, the North Dakota Indian Education Association, the Minnesota Indian Education Association, the National Congress of American Indians, the American Psychological Association, twenty of UND's Indian-related programs, and dozens of other national, regional and local organizations.

18. On February 6, 2006, a group of more than 120 UND faculty members signed a letter to Chancellor Robert Potts stating that retiring the "Fighting Sioux" nickname and logo is "long overdue." NCAA Ex. 5, Attach. 5.

19. On March 8, 2006, the UND Indian Association passed UNDIA Resolution GM01-2006. NCAA Ex. 5, Attach. 4. The Resolution called the "Fighting Sioux" nickname and logo "demeaning" and noted that use of the nickname encourages practices that "trivialize our traditions, culture, and spirituality." *Id.* The Resolution also noted that "21 American Indian related programs at the University of North Dakota have given their full and unanimous support to discontinue the use of the FIGHTING SIOUX tm nickname and logo." *Id*.

Each of these facts was presented to the Executive Committee and each is set forth in the May 15, 2006 decision letter to UND. UND Ex. F. Each also clearly shows that continued use of the "Fighting Sioux" nickname and logo in NCAA championship events is inconsistent with the NCAA Constitution and inconsistent with the NCAA's commitment to providing championship venues free of hostile or abusive references to Native Americans. When combined with UND's extremely pervasive use, these facts clearly support application of the Policy to the "Fighting Sioux" nickname and logo.

Despite extensive briefing and numerous submissions, UND presented no persuasive information controverting the facts summarized above. Instead, President Kupchella dismissed this information, stating without support that nickname opponents "choose to be insulted" by the Native American references. UND Ex. K, 1. UND also argued that the "Fighting Sioux" nickname and

imagery are used in a manner which honors the Sioux Tribes rather than harms them. In fact, the NCAA does not believe UND originally intended its use of the "Fighting Sioux" references to harm or demean Native Americans. However, UND has been on actual notice of the inherent harms and specific objections for decades, yet it has elected to ignore overwhelming objections and overwhelming data showing that its actions are, in fact, harmful regardless of original intent. Furthermore, UND's argument is simply not supported by the facts. The United States Commission on Civil Rights Report, the APA Report and the cited studies conclude that continued use of American Indian nicknames and images in athletics is inherently detrimental to Native Americans. UND Ex. R, Attachs. 13, 15. Specifically, the APA concluded that such use "establishes an unwelcome and oftentimes hostile learning environment for American Indian students that affirms negative images/stereotypes that are promoted in mainstream society." UND Ex. R, Attach. 15. Closer to UND, the very Tribes purportedly honored feel degraded instead. *Id*. at Attachs. 3-11. UND's argument is also contradicted by the clear message that Native groups on campus are trivialized rather than honored by the nickname and logo. NCAA Ex. 5, Attachs. 2, 4-5. Based on this uncontroverted evidence, the NCAA found that continued use was harmful, not honoring, to Native Americans.

UND provided the NCAA Staff Review Committee and the governance bodies no study and no data rebutting the overwhelming evidence supporting application of the Policy. UND Ex. O; UND Ex. Q; UND Ex. S; UND Ex. U. Rather, UND spent the vast majority of its briefs attacking the NCAA and outlining campus programs targeting Native American students.[13] In short, UND produced no persuasive information supporting continued use of the nickname, whereas the NCAA decisions were supported by significant and virtually uncontroverted evidence. In light of that

[13] The NCAA has repeatedly praised UND for its many campus services to Native American students. *See, e.g.*, UND Ex. T, 4. Providing excellent services, however, does not give UND leave to exploit the Sioux tribes and still expect to host NCAA championship events or bring unwelcomed imagery . *Id*.; UND Ex. F, 6.

evidentiary support, the NCAA decisions cannot constitute a breach of the duty of good faith and fair dealing – even if recognized in North Dakota – and cannot be arbitrary or capricious. Plaintiff's motion should be denied accordingly.

C. North Dakota Courts Defer to Decisions of a Private Association

As noted before, North Dakota courts largely defer to decisions of a private association. Here, the NCAA denied UND's request for exemption from the Policy on three separate (and unanimous) occasions. The Staff Review Committee, the Division II Presidents Council and the Executive Committee each determined that the "Fighting Sioux" nickname and logo were subject to the Policy. Those decisions, like the Policy itself, are entitled to considerable deference. *NCAA v. Lasege*, 53 S.W.3d 77, 85 (Ky. 2001) (NCAA determinations are entitled to a "presumption of correctness" and "the trial court wrongfully substituted its judgment for that of the NCAA after it analyzed the evidence and reached a different conclusion").

Three committees of education professionals with expertise in intercollegiate athletics weighed the evidence presented and made a decision within their discretion and authority. These are representatives of NCAA institutions applying an NCAA Policy. UND disagrees with those committees. UND's disagreement is simply not sufficient to support the dramatic demand that this Court review and reverse decisions of an Association's administrative bodies, especially when those bodies are interpreting the Association's own Policy. UND's disagreement also does not render the NCAA's decisions a breach of any implied covenant of good faith and fair dealing. This Court is not designed to sit as an appellate body to review decisions of a private Association each time a member objects. *See Brookins*, 142 F. Supp. 2d at 1153. Judicial intervention into such decisions would substitute established standards and procedures with uncertainty. It would also strip an Association of the power to govern itself and would lead to results which are inconsistent and inequitable for every other member of the Association. This Court should not accept UND's invitation to sit as an

appellate body reviewing a decision made, and twice affirmed, by experts leading a private Association.

UND cannot, as a matter of law, demonstrate a probability of success on claim in Count II. Plaintiff's motion for extraordinary relief should be denied accordingly.

D. The Administrative Appeal Process was Fair and Unambiguous

Likely aware that the overwhelming facts supported the ultimate appeal decisions, UND chooses to attack the definitions and applicable standards employed during the appeals process rather than the weight of probative evidence. Even if meritorious, complaints regarding applicable definitions and standards do not constitute bad faith or otherwise violate the (yet unrecognized) implied duty of good faith and fair dealing.

Given the technical nature of UND's arguments on this point, it is important to keep the bigger picture in mind. Specifically, UND employs for its own gain, in an extremely pervasive manner, a racial nickname and a stereotypic image which are inherently degrading to Native Americans. UND does this over clear objections from the very Tribe they claim to "honor." Rather than deal with these realities, UND complains about its own alleged mistreatment. The complaints ring hollow.

1. *Definitions of "hostile" and "abusive"*

As it did during the administrative appeal process, UND purports to be confused about the meaning of the words "hostile" and "abusive." UND also accuses the NCAA of abandoning one definition and opting for another during the administrative review process. There should be no confusion and there was no change.

The press release on which UND relies expressly states that the Executive Committee adopted the applicable standard "in part" from case law. UND, Ex. H. In choosing between possible standards to adopt, the Executive Committee considered, among other things, standards employed in

different types of cases. *Id*. At no time did the NCAA adopt specific definitions of "hostile" or "abusive" used by courts. In fact, the *Harris* case on which UND relies does not define the terms. Instead, the Court simply identified a set of factors to consider in determining whether "all the circumstances" create a hostile or abusive environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). Even when applying a set of factors, courts frequently consult dictionary definitions of common terms. *See Zuger v. Zuger*, 1997 ND 97, ¶ 28, 563 N.W.2d 804, 809 (evaluating term within a statute according to Webster's Dictionary definition and balancing set of factors); *Myers v. Richland County*, 429 F.3d 740, 751 (8th Cir. 2005) (noting that the Supreme Court of North Dakota "looks to the dictionary" to determine the meaning of terms). Legal factors and dictionary definitions are not mutually exclusive.

By considering alternative case law standards when adopting the Policy, the NCAA did not bar itself from following the ordinary usage of common terms found in the standard which was ultimately adopted. Using dictionary definitions of common terms hardly demonstrates bad faith or unfair dealing by a private association. UND offers no support for a ruling otherwise.

Making the matter more complicated than necessary, UND attempts to split hairs between the ordinary use of "hostile" or "abusive" and use by federal courts.[14] However, UND identified no material difference between the *Harris* factors and the common usage of either "hostile" or "abusive." Rather, UND summarily argues that the NCAA 1) could not have made a unique inquiry into UND's nickname and logo, and 2) failed to present evidence of hostile or abusive use by UND.

UND's conclusory arguments are not supported by their attack on the definitions of terms. Furthermore, both arguments are entirely rebutted by the Executive Committee's detailed decision

[14] A public institution of higher learning should not engage in conduct which is hostile or abusive under any definition.

letter of May 15, 2006, which included a discussion of relevant factors and a lengthy recitation of evidence supporting the decision. UND Ex. F.

The Staff Review Committee, the Division II Presidents Council and the Executive Committee each conducted a thorough review of the unique facts arising at UND. Those facts are outlined above and were not in dispute. Each body applied those unique facts to all relevant factors and drew an appropriate conclusion. There is no reason to disturb any of those decisions.

UND's argument is also entirely academic. Even assuming there is some material difference between court and dictionary definitions, UND's continued and pervasive exploitation of Sioux Tribes satisfies even the most stringent use of the terms "hostile" or "abusive." UND's technical arguments are nothing more than distractions from the simple main issue and cannot support a finding of bad faith or unfair dealing.

2. *The NCAA's Standard on Appeal*

Again, UND distracts from the main issue by complicating a simple concept. Specifically, UND paints this Court a picture of an administrative process where institutions were asked to aim at a moving target. UND overreaches.

The standard for obtaining relief from the NCAA did not change during the administrative review process. In virtually every administrative appeal, and in virtually every appeal in our legal system, the party seeking review bears the burden of showing it is entitled to relief. Similarly, here, institutions subject to the Policy bore the burden of demonstrating that they were entitled to relief. For example, in its initial request for relief, UND bore the burden of demonstrating that it should be removed from the list of institutions which were subject to the Policy. When the Staff Review Committee denied that request, UND bore the burden of persuading the Division II Presidents Council and the Executive Committee that the Staff Review Committee erred. *See, e.g.*, UND Ex. R, 6 ("The Executive Committee may reverse the ruling of the staff committee only if the institution

demonstrates that the ruling clearly was contrary to the evidence considered"). Before this Court, UND cited no authority for the proposition that these basic appellate standards somehow demonstrate bad faith or otherwise show the absence of good faith and fair dealing. UND also did not explain how its objection to the standard supports its request to be excused from complying with a non-discrimination Policy.

UND also claims great confusion about the data supporting the Policy and administrative decisions applying the Policy. UND's argument ignores the facts and its own involvement in the process. UND knew precisely the research, surveys, studies, data and other information on which the Policy was adopted and applied. Indeed, UND quoted from the 2002 MOIC report in one of its many briefs in the administrative process. UND Ex. U, 7. UND attached the MOIC report to its brief before the Executive Committee and also attaches it here. That report contained a lengthy discussion of its findings, complete with attachments and other descriptions of the underlying data. *Id*. UND knows the Policy and the appellate process were not based solely on the Fryberg study. The NCAA is not the party acting in bad faith.

Furthermore, the NCAA provided every opportunity for institutions to submit studies, data, research, publications, surveys, reports, articles, books, videos, anecdotal accounts or any other information in support of requests for relief. *See, e.g.,* NCAA Ex. 5 (providing UND "every opportunity to present pertinent information to the Executive Committee"). When UND expressed confusion during the process, the NCAA went to great lengths to assure that UND had full information and that UND was allowed to submit everything it desired. In fact, on December 20, 2005, Dr. Franklin wrote Julie Ann Evans, UND's General Counsel, and invited UND to submit additional information in light of UND's apparent misunderstanding of the process. A copy of the letter is attached hereto as NCAA Ex. 8 (assuring "that North Dakota has a fair opportunity to

present its case to the Executive Committee"). *See also* UND Ex. T, 2-3, 12 (Staff Review Committee urging the Executive Committee to consider all of UND's arguments, including those which had not been properly preserved in earlier briefs).

Rather than showing bad faith and unfair dealing, the facts demonstrate that the NCAA provided multiple layers of meaningful administrative appellate review. The facts also show that the NCAA employed elementary appellate standards and allowed UND extraordinary flexibility in submitting information in support of its requests for review. Accordingly, plaintiff did not and cannot show that the NCAA's conduct would violate a duty of good faith and fair dealing, if such a duty were recognized. Because UND cannot show a probability of success on such a claim, even if recognized in North Dakota, entry of the requested injunction is not appropriate.

E. Exemptions Granted to Other Institutions do not Render the UND Decision Arbitrary

Again shifting the focus away from the substantive issue and supporting facts, UND argues that other NCAA decisions regarding other institutions somehow render the UND decisions arbitrary. Throughout the appeals process UND argued that it was similarly situated to Florida State University ("FSU") and Central Michigan University ("CMU"). Specifically, UND argued that it, like those schools, enjoyed the support of a namesake Tribe. UND's argument is not supported by the facts and the NCAA rejected it on three separate occasions. This Court should do the same.

Before addressing the substance of UND's position, it is important to note that UND's Memorandum makes a number of unsupported and inflammatory statements regarding the NCAA's motivation behind the so-called namesake exemption. This portion of UND's brief is noticeably short on factual citations. In fact, UND's speculations are incorrect and immaterial. Lacking any probative value, UND's naked theories should be disregarded.

1. *Adoption of the Namesake Exemption*

Contrary to UND's speculation that the namesake exemption was crafted to appease a single institution, the exemption process employed in this context is consistent with the general NCAA process employed in other contexts. Harrison Aff., ¶ 16. Specifically, the long-standing NCAA approach is to adopt a rule of general applicability and then provide a process whereby aggrieved individuals or institutions can seek relief in the form of an exemption or a waiver. *Id*. The NCAA elected to use that familiar structure in connection with the Policy at issue. *Id*.

In fairness, the namesake exemption demonstrates flexibility at the NCAA rather than bad faith. It demonstrates an understanding that, on a case-by-case basis, exceptional circumstances may justify individual relief from a general position. The NCAA makes room for those extraordinary situations. In this context, the namesake exemption also demonstrates respect for the sovereignty of federally-recognized Native American nations. *Id*. ¶ 18. Although the NCAA still finds exploitation by FSU and CMU to be hostile or abusive, the NCAA will not substitute its views for those of the sovereign Tribes most affected. UND Ex. T, 12. Deference to official decisions of a sovereign nation is hardly evidence of bad faith or unfair dealing.

2. *Application of the Namesake Exemption*

Every request by every institution was decided on an individual basis because each case presented unique issues and different facts. If two institutions had been similarly situated, those schools would have received identical analysis and identical results. The reality, however, is that no two schools (and no two requests) were alike. Harrison Aff., ¶ 19. Even a cursory review of the facts shows that UND is not similarly situated to either FSU or CMU. Indeed, there are dramatic differences which UND consistently ignores.

First, and most importantly, both FSU and CMU had express, unambiguous and affirmative permission to use the Seminole and Chippewa names, respectively. For example, the Florida

Seminole Tribe officially assigned FSU the right to use the Florida Seminole name and symbols. UND Ex. L. The Saginaw Chippewa Indian Tribe not only granted CMU express permission to use the name, the Tribe reaffirmed its position and entered into joint proclamations with CMU regarding use of the name. O'Meally Aff., ¶ 11. Both schools also had a documented and lengthy history of working together with the namesake Tribes.

In stark contrast, no Sioux Tribe gave UND express, unambiguous or affirmative permission to use the Sioux name. As it did throughout the administrative appeal process, UND points to Resolution No. AO5-01-041 of the Spirit Lake Tribe of Indians (UND Ex. R, Attach. 4) and claims namesake support. However, careful reading shows that the Resolution does not grant UND permission to use the Sioux name. UND Ex. R, Attach. 4. Rather than clear and affirmative support, the Spirit Lake Resolution is 1) conditional, and 2) drafted in the negative. *Id*. The operative language provides that "as long as something positive comes from this controversy," the Spirit Lake Tribe is "not opposed to keeping the 'Fighting Sioux' name and the present Logo at UND." *Id*.

"Not opposing" continued use of the Sioux name falls far short of the affirmative support provided other institutions by other Tribes. This so-called "permission" by the Spirit Lake Tribe is not comparable to the rights assigned by the Florida Seminoles or the joint proclamations of CMU and the Chippewas. Furthermore, the continued viability of the Spirit Lake Resolution is unclear. Specifically, the United Tribes of North Dakota is an association which represents the federally-recognized Tribes in North Dakota. Its Board of Directors contains council members from each of those Tribes, including the Spirit Lake Tribe. In September 2005, the United Tribes of North Dakota Board of Directors adopted Resolution 05-06 which unambiguously opposes continued use of the "Fighting Sioux" nickname and logo. UND Ex. R, Attach. 3.

Even if Spirit Lake's continued support for its 2000 Resolution were clear, UND never demonstrated that the condition precedent in the Resolution was satisfied. Rather than "something positive" coming from the controversy, the issue remained and still remains divisive at UND. For example, since the Resolution was adopted in December 2000, campus groups and other Sioux Tribes have noted that exploitation of the Sioux name is "demeaning," has a "serious negative impact on learning" and "hinders the full participation of many of the American Indian students in all aspects of campus life." UND Ex. R, Attach. 3; NCAA Ex. 5, Attachs. 2, 4-5; NCAA Ex. 6. The UND Senate and the faculty representatives based their resolutions, in part, on a 2004 report of the Higher Learning Commission of the North Central Association of Colleges and Schools ("NCA") which linked the nickname and logo with negative impacts on UND's academic mission. NCAA Ex. 5. Hostility toward native students has also continued, as evidenced in posters calling native students "prarie nigga[s]" and telling them to "go back to the res." NCAA Ex. 4. The posters expressly reference the nickname controversy. *Id*. Other repugnant images and actions have also contributed to a hostile campus environment for native students at UND. *Id*. UND has not identified anything positive which came from the controversy.

Second, other Sioux Tribes in and around North Dakota officially and clearly condemned continued use of the Sioux name and imagery by UND. The Tribes passed Resolutions, passed confirming Resolutions, wrote letters and otherwise respectfully communicated that 1) they found the nickname degrading, and 2) use of the Sioux name and imagery should cease immediately. UND Ex. R, Attach. 3-11. The message from the Sioux Tribes has been unmistakable. That message vitiates any suggestion that UND has the support of the Tribe whose name it has appropriated.

In contrast to the outcry from area Sioux Tribes, the NCAA did not receive such opposition from other Chippewa or Seminole tribes. The cases were not even close. In fact, the NCAA

received no Resolutions or other official statements in opposition from Chippewa Tribes in connection with use of the name by CMU. O'Meally Aff., ¶ 12.[15] Any opposition by Seminole Tribes to FSU's use was publicly withdrawn immediately after the Policy was announced. *Id*. ¶ 10. When the FSU request was heard, there was no opposition by Seminole Tries to FSU's use of the name and imagery. *Id*. UND is not similarly situated to FSU or CMU.

Rather than showing bad faith by the NCAA, comparing and contrasting the cases shows that the NCAA provided individualized analysis to unique cases. It also shows that the decisions not to award a namesake exemption to UND were supported by substantial evidence. That UND preferred a different result does not support a finding that the decisions were arbitrary, capricious or breached any duty of good faith and fair dealing. The NCAA's application of the namesake exemption is entitled to deference, and UND has not shown any likelihood of success in disturbing that deference. UND's motion for a preliminary injunction altering the status quo should be denied.

IV. UND CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS ANTITRUST CLAIM (COUNT III)

UND's antitrust challenge is brought under N.D.Cent.Code §15.08.1-02, which tracks Section 1 of the federal Sherman Act in prohibiting unreasonable restraints of trade.[16] The NCAA and voluntary membership groups like it have been sued under Section 1 on theories similar to those now brought by UND, and the law established by those cases is clear: UND stands no chance of success on the merits, for at least three reasons.

---

[15] It is also important to note that CMU uses no Native American imagery, logo or symbol, and does not use the adjective "fighting" as part of its nickname. O'Meally Aff., ¶ 13.

[16] UND agrees that actions under North Dakota's Antitrust Act, N.D.Cent.Code 51-08.1, which follows the Uniform State Antitrust Act, should be adjudicated in accordance with federal antitrust law. UND Mem., p. 67. In particular, N.D.Cent.Code § 15-08.1-02 provides that "[a] contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." This language is similar to that of section 1 of the Sherman Act, 15 U.S.C. § 1. Therefore, the federal courts' analysis of section 1 of the Sherman Act is applicable to UND's claims.

First, the antitrust laws are concerned only with alleged restraints on "trade or commerce," and the Policy is no such restraint. Second, the Policy is not, as UND claims, a "group boycott," because it does not exclude UND from ***any*** competition, athletic or otherwise (including NCAA championships); instead, it merely places some conditions on UND's participation in those championships.[17] Finally, UND has alleged, at most, an injury only to itself, and the antitrust laws are concerned only with those restraints that cause significant injury to competition as whole, rather than injury to a single competitor like UND.

There is no antitrust violation here. Because the NCAA's challenged Policy is entirely lawful under the antitrust laws, UND's faulty arguments do not merit a preliminary injunction, especially a mandatory injunction.

A. The NCAA's Policy is not a Restraint of "trade or commerce" and is not Subject to Antitrust Review

UND stands no chance of succeeding on its antitrust claims because the Policy is not a restraint of "trade or commerce" and accordingly is not subject to antitrust attack. Like Section 1 of the Sherman Act, N.D.Cent.Code § 15-08.1-02 unambiguously requires that the challenged restraint operate in "trade or commerce in a relevant market." It is well established that the "trade or commerce" requirement acts as an outer bound on the reach of the antitrust laws, which apply only to commercial restraints.[18] *See*, *e.g.*, *Worldwide Basketball & Sports Tours, Inc. v. NCAA*, 388 F.3d 955, 958 (6th Cir. 2004) ("By its plain language, [the Sherman Act] applies to the [NCAA's] rule only if

[17] The limited effect of the Policy cannot be stressed enough: It does not apply to regular season games and it does not regulate imagery or nicknames used by UND during its conference games. Despite UND's attempt to argue that it is being boycotted by the NCAA, the Policy is, in fact, no more than a legitimate decision by the NCAA's members to proactively preserve the nature of intercollegiate athletics as free from any offensive stereotyping.

[18] Although the "trade or commerce" requirement discussed above is couched in language similar to the requirement that alleged violations of the Sherman Act must affect interstate commerce in order to establish federal court jurisdiction, the two concepts are in fact entirely distinct. The "trade or commerce" requirement discussed above is a substantive component of the antitrust laws, not a limit on federal court jurisdiction. Indeed, it is typical for federal courts to simultaneously (1) conclude that federal jurisdiction is established over an antitrust claim because an effect on interstate commerce has been alleged and (2) dismiss that claim because the plaintiffs failed to satisfy the substantive requirement that the alleged restraint is a restraint of "trade or commerce."

the rule is commercial in nature."); *Dedication and Everlasting Love to Animals v. The Humane Society of the United States, Inc.*, ("*DELTA*") 50 F.3d 710, 712 (9th Cir. 1995) ("Interpreting the Sherman Act, the Supreme Court has spoken of 'commerce' in terms of 'the purchase, sale, and exchange of commodities'") (*citing Addyston Pipe & Steel Co v. United States*, 175 U.S. 11, 20 S. Ct. 96, 44 L.Ed. 136 (1899)). Courts have thus repeatedly rejected antitrust challenges to alleged "restraints" which had only an incidental or indirect effect on trade or commerce. *See e.g.*, *Nat'l Org. of Women, Inc. v. Scheidler*, 968 F.2d 612, 620-621 (7th Cir. 1992), *rev'd on other grounds*, 510 U.S. 249 (1994); *M&H Tire Co. v. Hoosier Racing Tire Co.*, 733 F.2d at 985 n.8 (1st Cir. 1984).

As one court has explained:

> Non-profit organizations are not per se entitled to exemption from the Sherman Act. However, when these organizations perform acts that are the antithesis of commercial activity, they are immune from antitrust regulation. The legislative history of the Sherman Act reveals that it was not intended to reach noncommercial activities that are intended to promote social causes.

Bronx Legal Services v. Legal Services for New York City, 2003 U.S. Dist. LEXIS 695, No. 02 Civ. 6199, *11 (S.D.N.Y. January 17, 2003), *aff'd,* 2003 U.S. App. LEXIS 22280 (2d Cir. Oct. 29, 2003).

Courts have repeatedly held that NCAA rules that regulate intercollegiate athletics are not restraints of "trade or commerce" and thus cannot be challenged under the antitrust laws. *See Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004) (recruiting rules are noncommercial); *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999) (holding that NCAA eligibility rule did not regulate "trade or commerce" and thus could not be challenged under the Sherman Act); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 497 (D. N.J. 1998) (eligibility rules not subject to Sherman Act scrutiny); *Gaines v. NCAA*, 746 F. Supp. 738, 744-46 (M. D. Tenn. 1990) (same); *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975) (same);

Aculeus 5 LLC v. NFL Properties et al., Case No. CV 04-4252 GAF (C.D. Cal. 12/29/2004) (rule regarding football gloves not subject to Sherman Act); *Tanaka v. University of S. Cal*., No. SA CV 99-663-GLT, 1999 U.S. Dist. LEXIS 18618 (C.D. Cal. 11/29/99) (rule regarding transfers of student-athletes noncommercial); *Adidas America, Inc. v. NCAA*, 40 F. Supp. 2d 1275 (D. Kan. 1999).

The *Adidas* case is closely analogous to this case. In that case, Adidas challenged NCAA Division I Bylaw 12.5.5, which governs the size and placement of logos on athletic uniforms worn by student-athletes during intercollegiate games. Adidas alleged that the bylaw was an unreasonable restraint on the advertising and promotions markets, since it prevented Adidas from making greater use of NCAA uniforms as an advertising vehicle. *Id*. at 1277. The court rejected Adidas' claim – and denied Adidas' request for a preliminary injunction – because it concluded that the bylaw had "noncommercial purposes and objectives" and did not provide the NCAA with any commercial or economic advantage. *Id*. at 1285-86 (denying motion for preliminary injunction).

Similarly, the Policy at issue in this case has the noncommercial objective of removing all offensive nicknames and imagery from postseason games associated with the NCAA. It is not intended to, and does not, provide the NCAA with any commercial advantage.[19] There is no exchange of money or commodities implicated by the NCAA's Policy. *Bronx Legal Services*, 2003 U.S. Dist. LEXIS 695 at *11 ("The exchange of money for services is the hallmark of a commercial transaction."). The Policy is thus not the type of restraint contemplated by N.D.C.C. § 15-08.1-02 or

[19] All of the NCAA's member institutions are expected to abide by this Policy in exchange for the privilege of participating in NCAA postseason games and championships. The NCAA is not isolating any institution. It is not that a few institutions are capturing the regulatory powers of the NCAA. It is only an expected condition of membership if member institutions wish to enjoy the privileges of competing in postseason games with other members under the auspices of the NCAA. The Policy is enacted to ensure that intercollegiate games associated with the NCAA are not subject to attack for stereotyping or degrading Native American culture. *Cf. American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). "When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages." 486 U.S. at 501 (internal citation omitted).

the Sherman Act. *DELTA,* 50 F.3d at 712; *see also Marjorie Webster Junior Coll., Inc. v. Middle States Ass'n of Colls. and Secondary Sch., Inc.,* 432 F.2d 650, 654 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970) (Sherman Act does not apply to college accreditation decisions even though they have an incidental effect on commerce).

Moreover, UND's allegations that college sports have commercial aspects are not sufficient to transform the clearly noncommercial Policy into a restraint of "trade or commerce." It is well established that a noncommercial restraint is not subject to the Sherman Act merely because it has an incidental or indirect effect on commerce. *Sheppard v. Lee*, 929 F.2d 496, 499 (9th Cir. 1991) ("[c]onsistent with the statutory purpose of promoting commercial competition, an activity must in some way involve such competition in order to constitute 'trade or commerce'"); *see also Monsanto Co. v. Spray-Rite Service Co*rp., 465 U.S. 752, 761 (1984). UND was thus required to allege facts showing that that the Policy itself somehow directly restrains trade or commerce; it cannot rely on the supposedly commercial character of college athletics as a whole, nor can it rely on the fact that the Policy might have an incidental effect on commerce. *See, e.g., Jones v. NCAA*, 392 F. Supp 295, 303 (D. Mass. 1975) (Plaintiff failed to show "how the action of the N.C.A.A. in setting eligibility guidelines has any nexus to commercial or business activities in which the defendant might engage."); *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999) ("rather than focus on [plaintiff's] alleged injuries, we consider the character of the NCAA's activities.").[20]

[20] This doctrine has its roots in the Supreme Court's seminal decision in *Apex Hosiery v. Leader*, 310 U.S. 469, 491-502 (1940), which held that even though a strike by hosiery workers drastically affected commerce because it led to the shut-down of the hosiery factory, the strike was noncommercial activity which was not subject to the Sherman Act because it "was not intended to have and had no effect on prices of hosiery in the market." The Court explained that "[t]he end sought [by the Sherman Act] was the prevention of restraints to free competition in ***business or commercial transactions*** which tended to restrict production, raise prices or otherwise control the market . . . ." *Id*. at 493 (emphasis added).

UND has not made the required showing. The challenged NCAA Policy does not, on its face, regulate the price or quantity of any product associated with intercollegiate athletics,[21] and UND has made no other showing that the Policy itself is somehow a direct commercial restraint or regulates competition in the marketing or pricing of any goods.[22] Any effects on UND's economic gains are only incidental to the means adopted by the NCAA to achieve its noncommercial objectives. *See Pocono Invitational Sports Camp*, 317 F. Supp. 2d at 584 (the "test for whether a restraint is commercial or noncommercial is not whether the restraint results in some kind of incidental economic effect."); *DELTA*, 50 F.3d at 714 ("Not every aspect of life in the United States is to be reduced to such a single-minded vision of the ubiquity of commerce. If self-serving activity is necessarily commercial, the Sherman Act embraces everything from a church fair to the solicitation of voluntary blood donors."). Since that is not enough to support an antitrust claim, UND's motion should be denied.

B. The NCAA's Policy is not a Group Boycott

UND's antitrust claims are also infirm because the Policy is not an illegal "group boycott," as UND claims. UND admits that the NCAA, through its legislative process, may enact rules and regulations, including the Policy at issue:

> There was a right way under the Contract for the Executive Committee to attempt to ban the use of Native American imagery by the NCAA's member institutions, but the Executive Committee did an end run around it. Instead of proposing legislation to the entire membership for a vote … the Executive Committee instead asserted that it has the power to promulgate the Policy ….

UND Mem., p. 47. UND therefore concedes that ***substance*** of the Policy is a legitimate undertaking by the NCAA; its only apparent quarrel is with the procedure that was used to formulate the Policy.

[21] UND is welcome to participate in postseason games, provided its record permits, so long as it does not bring hostile or abusive racial references to those contests.

[22] The Supreme Court "has never applied the Sherman Act in any case … unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services." *Id*. at 495.

Having made that concession, UND cannot plausibly claim that the Policy is such an affront to the antitrust laws that it should be seen as practically a *per se* violation of those laws. UND's attempts to invoke such quasi *per se* review through the simple expedient of labeling the Policy as "group boycott" fail on both the facts and the law.

N.D.Cent.Code 51-08.2, like Section 1 of the Sherman Act, prohibits contracts, prohibits only ***unreasonable*** agreements and contracts. *Texaco, Inc. v. Dagher*, 126 S. Ct. 1276, 1279 (2006). Conduct challenged under section 1 of the Sherman Act can be analyzed under one of two rules of analysis: 1) the *per se* rule, which is reserved for those practices with which courts are so familiar that their harm to competition can be presumed without in-depth analysis, and 2) rule of reason analysis, under which courts must evaluate the alleged anticompetitive effect and procompetitive justifications of a challenged practice.[23] *Dagher*, 126 S. Ct. at 1279-80. UND concedes that the NCAA's Policy should be analyzed under the rule of reason, but it advocates an abbreviated quick look rule of reason.[24] UND Mem., p. 69.

UND's argument that the Policy violates the antitrust laws rests entirely, and erroneously, on its bare allegation that the Policy is a "group boycott." Because some group boycotts have been held to be *per se* violations of the Sherman Act, UND claims that its "initial burden in a Quick-Look analysis is met." *Id*. That is not the law.

---

[23] Since the seminal Supreme Court opinion in *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), no court has analyzed the NCAA's rules under the *per se* analysis, as UND concedes, and most have applied full rule of reason analysis. *Bd. of Regents* recognized that the NCAA's rule making function is an integral activity of the organization. Because it is infeasible for each member institution to make its own set of rules apart from its athletic competitors, a central body is needed to formulate uniform rules, and that authority is vested in the NCAA. As *Bd. of Regents* acknowledged, the NCAA's rulemaking activities are procompetitive in that they make possible the existence of intercollegiate athletics. 468 U.S. at 102. Therefore, the NCAA's rules should be analyzed under the full rule of reason.

[24] However, as the Supreme Court explained in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), where there are procompetitive justifications for a challenged restraint, the court should rule out an "indulgently abbreviated review" of the restraint and accord it a full rule of reason analysis. 526 U.S. at 778; *see also Dagher*, 126 S. Ct. at 1280, n. 3. As discussed below, in Section IV D, the NCAA's Policy is supported by legitimate procompetitive justifications which must be considered by this Court in its full rule of reason analysis.

1. *The Policy is not a "group boycott"*

First, the Policy is simply not the type of alleged restraint that Courts have categorized as *per se* illegal group boycotts. Supreme Court "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors." *Nynex v. Discon*, 525 U.S. 128, 135 (1998). The Policy is not a "horizontal agreement among direct competitors." UND and the NCAA are not direct competitors for any purpose, and the Policy is a vertical, rather than horizontal, agreement.[25] The NCAA organizes postseason championships which feature its member institutions. For that purpose the NCAA is in a vertical relationship with its member institutions who supply their athletic teams for the championships. Vertical relationships are analyzed under the full rule of reason, even when they are labeled "group boycotts." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977).

Nor could the Policy be treated as a *per se* "group boycott" even if it could be characterized as a horizontal agreement. The concerted actions of voluntary membership associations are not *per se* illegal "group boycotts" when those actions are not commercially motivated. *See State of Missouri v. Nat'l Organization for Women*, *Inc.*, 620 F.2d 1301, 1302 (8th Cir.), *cert denied*, 449 U.S. 842 (1980) ("a politically motivated but economically tooled boycott participated in and organized by noncompetitors of those who suffered as a result of the boycott" does not violate antitrust laws.) For example, in *American Brands, Inc. v. Nat'l Ass'n of Broadcasters*, 308 F. Supp. 1166 (D. D.C. 1969), plaintiff sought a preliminary injunction from the decision of the Code Authority – a private trade association administering advertising standards – to ban its advertisements because they were deceptive about the addictiveness of its cigarettes. Plaintiff sued claiming an antitrust violation for its exclusion. The court denied the preliminary injunction finding that the standards of the Code

[25] "Horizontal" agreements are those between entities at the same level on the production chain (e.g., an agreement between two retailers), while "vertical" agreements are those between entities on different levels of the production chain (e.g., an agreement between a wholesaler and a retailer).

Authority served the public interest in disclosure of relevant facts in advertising. *Id*. at 1169. Similarly, the NCAA's Policy serves the public interest in removing all offensive imagery and nicknames from intercollegiate athletics that undermine Native Americans.

This rule has often been used to defeat antitrust challenges to the rules of the NCAA or other athletic bodies. In, *Hairston v. Pacific 10 Conference*, 101 F.3d 1315 (9th Cir. 1996), for example, the plaintiffs filed a complaint challenging sanctions levied against them for violations of athletic-recruiting rules as violations of the Sherman Act. The court granted summary judgment to defendants finding that plaintiffs had failed to show that the sanctions were anticompetitive. *Id*. at 1319. Similarly, in *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983), the court held that the *per se* rule was not applicable to exclusion of football athletes from postseason and televised games, similar to the Policy at issue, as a sanction for unauthorized compensation to players, where such exclusion "pertained solely to the NCAA's stated goal of preserving amateurism." *Id*. at 379. *See also Molinas v. NBA*, 190 F. Supp. 241, 244 (S.D.N.Y. 1961) (suspension of basketball player for gambling upheld has reasonable: "Every league or association must have some reasonable governing rules, and these rules must necessarily include disciplinary provisions."); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co*., 472 U.S. 284 (1985) ("The act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect."); *Smith v. Pro Football*, 593 F.2d 1173 (D.C. Cir. 1978) ("The courts have consistently refused to invoke the boycott per se rule where, given the peculiar characteristics of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal, or where the concerted activity manifested no purpose to exclude and in fact worked no exclusion of competitors.").

The Policy is neither a "group boycott," nor otherwise subject to *per se* analysis, under the above cases. The Policy simply is not a "boycott," group or otherwise. The Policy has no application to regular season competitions at all. Moreover, UND remains free to host, and participate in, NCAA championships, so long as it agrees to abide by the terms of its NCAA membership. In particular, UND can thus continue to:

- Participate in regular season games in its conference and use its nickname and imagery;
- Host games during the regular season and use its nickname and imagery; and
- Participate in postseason games (if its record permits) as long as it does not bring racial names or images to the contests.

There is, in short, no "restraint" here at all, let alone a restraint severe enough to be labeled a "boycott."[26] The NCAA has not excluded UND from membership. It has only made UND's participation in postseason play conditioned upon not bringing racial nicknames and imagery to the contests. Privileges often come with conditions. *See, e.g., Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (legislation under spending clause which grants rights to fund recipients is in the nature of a contract where "the recipients agree to comply with federally imposed conditions."). The NCAA is not obligated to extend privileges to all members regardless of their compliance with the NCAA's noncommercial rules and policies that further its objectives of promoting intercollegiate athletics in a wholesome environment as integrated into academics. *See*, *e.g.*, *Deeson v. The Prof'l Golfers' Ass'n of America*, 358 F.2d 165 (9th Cir.) *cert. denied*, 385 U.S. 846 (1966) (upholding rule forbidding

[26] "There can be no restraint of trade without a restraint." *Schachar v. American Academy of Ophthalmology*, 870 F.2d 397 (7th Cir. 1989).

tournament play to golfers not competing in a minimum number of tournaments).[27]

Instead of a "group boycott," the Policy is most properly understood as a condition of UND's participation in either hosting or playing in NCAA championships. And it is well established that voluntary associations like the NCAA can legally place conditions on benefits like participation in NCAA championships. "A voluntary business or membership organization may lawfully adopt reasonable standards of membership, and having done so it may thereafter restrict the incidents and advantages and benefits of membership to its members." *Brown v. Indianapolis Bd. of Realtors*, No. IP 76-587-C, 1977 U.S. Dist. LEXIS 15990, *9 (S.D. Ind. May 6, 1977); *see also Marrese v. American Academy of Orthopaedic Surgeons*, No. 80 C 1405, 1991 U.S. Dist. Lexis 424, *33 (plaintiff did not show that "Academy's denial of membership constitutes a group boycott under the Sherman Act)[28]; Because that is all the NCAA has done here, there is no merit to UND's antitrust claims. Its motion should be denied.

2. *Quick-look analysis is not, as UND suggests, "per se with a defense"*

UND's analysis would, moreover, fail even if the Policy could accurately be called a "group boycott," because UND has not established that the Policy is likely to be found unlawful under the

[27] Neither the NCAA nor its member institutions are obligated to associate with those members whose viewpoints and speech they do not endorse or approve. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (forced membership is unconstitutional if it affects group's ability to advocate viewpoints). By promoting the revered tradition of the student-athlete and the integration of athletics with academics, the NCAA is engaging in "expressive association" and its members cannot be required to associate with those institutions whose use of offensive Native American imagery isolates and denigrates Native American students. *See, e.g., Circle School v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004) ("By nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students." Therefore, requiring schools to force students to recite the Pledge of Allegiance infringes their associational rights.).

[28] Nor can UND claim that the NCAA has violated the antitrust laws by withholding its approval of UND's use of Native American injury. "The failure of a private, standard-setting body to certify a product is not, by itself, a violation of § 1." *Greater Rockford Energy and Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 396 (7th Cir. 1993). *See also Sanderson v. Brugman*, No. IP 00-459-C H/G, 2001 U.S. Dist. LEXIS 8309 (S.D. Ind. May 29, 2001) (plaintiff did not state a claim under § 1 simply because trade association criticized his method of water purification and did not provide him with "gold seal" of approval); *Schachar*, 870 F.2d at 399 ("An organization's towering reputation does not reduce its freedom to speak out" and plaintiff did not show anticompetitive effect from the academy's refusal to endorse his medical procedure).

"quick look" rule of reason. UND misrepresents the law on the standards that are employed when using a "quick look" rule of reason analysis. Quick look analysis is an abbreviated version of rule of reason analysis reserved for those cases in which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental*, 526 U.S. at 770. The challenged Policy is noncommercial in nature and certainly does not present a situation in which the effects on the customers and markets are obviously anticompetitive given its procompetitive justifications. Furthermore, simply presuming anticompetitive effects by alleging a group boycott without more ***is*** per se analysis which UND admits cannot be applied in this instance.

Moreover, even in quick look cases, plaintiffs are required to make some demonstration – rather than simply assume – that the alleged antitrust violation injures competition as a whole. *Cal. Dental*, 526 U.S. at 781; *Worldwide Basketball*, 388 F.3d at 961. The demonstration may be abbreviated, when compared to full rule of reason cases, but it must still be made. As we demonstrate below, UND has not even attempted to do so.

C. UND has not Shown Harm to Competition

UND has made no showing – or even any attempt to show – that the Policy injures competition as a whole, rather than simply injuring UND itself. That failure is fatal to UND's antitrust claims, even if they are reviewed under the "quick look" rule of reason (and they should not be). It is not enough that a challenged restraint regulate trade or commerce (which the challenged Policy does not do). The challenged restraint must also harm competition in the relevant market. Only if a challenged restraint reduces competition and harms consumers will it be condemned by the antitrust laws. "Hence, it is not the rule-making per se that should be the focus of the market power [or competitive

harm] analysis, but the effect of those rules. . . ." *SCFC ILC, Inc. v. Visa USA, Inc*., 36 F.3d 958, 968 (10th Cir. 1994).

1. *UND has not Alleged a Proper Relevant Market*

The first problem with UND's attempt to allege injury to competition is its failure to define a legally cognizable relevant product market. Even if the Court adopts a quick look rule of reason, the Policy's alleged anticompetitive effects must be analyzed in a relevant market. "The object is to see whether the experience of the ***market*** has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction" can be made with a quick look. *Cal. Dental*, 526 U.S. at 781 (emphasis added). UND has not properly defined a relevant market[29] and has not demonstrated any – let alone obvious –- anticompetitive effects. UND confuses "economic" harm with harm to competition: "A prohibition on hosting clearly demonstrates an ***adverse economic effect***, because members subject to the Policy are absolutely foreclosed from enjoying the benefits touted by the NCAA." UND Mem., p. 73 (emphasis added). Of course, "it is not enough for [plaintiff] merely to show that it was harmed in its capacity as a competitor. … [I]t is injury to the market, not to individual firms, that is significant." *Ralph C. Wilson Industries, Inc. v. Chronicle Broadcasting Co*., 794 F.2d 1359, 1363 (9th Cir. 1986) (internal quotations omitted).

The Sherman Act was not intended as protection for a competitor against the (sometimes harsh) outcome of competition, but instead as a proscription against consumer harm. An antitrust plaintiff must therefore show that the defendant's allegedly improper conduct injured consumers or competition as a whole, rather than just injured plaintiff. *See Rebel Oil Co., Inc. v. Atlantic Richfield*

[29] As plaintiff, UND bears the burden of defining a relevant market in which the effects of the Policy are to be analyzed. Without bearing this burden, UND's case can go no further. *See Worldwide Basketball & Sports Tours, Inc.*, 388 F.3d 955, 961 (6th Cir 2004) ("Under the 'quick-look' approach, extensive market and cross-elasticity analysis is not necessarily required, but where, as here, the precise product market is neither obvious nor undisputed, the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice."). UND has not properly pled a relevant product market. Its product market makes no reference to actual products bought and sold.

Co., 51 F.3d 1421, 1433 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995) (an act violates the Sherman Act "only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality") (emphasis in original); *see also Chicago Prof'l Sports Ltd. Pshp. v. NBA*, 961 F.2d 667, 670 (7th Cir. 1992) ("The antitrust injury doctrine requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers.").[30] And, such harm to competition must be assessed in a properly defined relevant market. Without showing any effect on competition in a proper relevant market, UND cannot show a likelihood of success on its antitrust claims.

2. *UND has Only Alleged Harm to Itself*

The second problem with UND's attempt to show injury to competition is that it has failed to show that the Policy supposedly injures anyone except UND. Quite the contrary: UND appears to claim that it is the only NCAA member being injured by the Policy. Such allegations are simply not the stuff of antitrust claims. The antitrust laws "were promulgated to protect competition, not competitors, and courts must analyze the question of antitrust injury from the viewpoint of the consumer of the product or services at issue." *Baglio v. Baska*, 940 F.Supp. 819, 828 (W.D. Pa. 1996); *Am. Ad Mgmt*., 190 F.3d at 1055 (9th Cir. 1999) ("[i]t is well established that the antitrust laws are only intended to preserve competition for the benefit of consumers"). For a plaintiff to have antitrust standing he must have suffered antitrust injury, i.e. of the type that flows from injury to competition. UND's injury does not flow from injury to competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 489 (1977); *Atlantic Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 334 (1990);

[30] Consumer harm is measured by lowered output resulting in higher prices. *Chicago Prof'l Sports Ltd. Pshp. v. NBA*, 95 F.3d 593, 597 (7th Cir. 1996) ("The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem."); *see also SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994) ("when we ask if a particular practice is 'reasonable' or 'unreasonable,' or if the practice is 'anticompetitive,' we use these terms with special antitrust meaning reflecting the Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods.") (internal quotation omitted).

Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1026 (9th Cir. 2001); *see also*, *Nelson v. Monroe Reg'l Med. Ctr.*, 925 F.2d 1555, 1564 (7th Cir. 1991) (Antitrust injury "means injury from higher prices or lower output, the principal vices proscribed by the antitrust laws."). The only injury that UND has identified is to itself and its athletic program. UND Mem., p. 73 ("UND … stand[s] to lose revenue and prestige if [it] is not allowed to host 'home-field' games or to bid for contracts to host NCAA events."). This is clearly not enough. *Les Shockley Racing, Inc. v. Nat'l Hod Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) (holding plaintiffs must "plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors").[31]

UND argues that it is harmed because the Policy keeps it from "competing evenly in championship events . . . ." UND Mem., p. 69. UND completely fails to explain how its alleged harm in athletic competition can be inferred to be injury to competition on the basis of price and quantity of goods in a relevant market. Antitrust law does not guarantee fair competition in the marketplace let alone fair competition on the athletic field. Antitrust law is concerned with protecting competition for the welfare of consumers, not competitors. "Competition, which is always deliberate, has never been a tort, intentional or otherwise." *Olympia Equipment Leasing Co. v. Western Union Tel. Co.,* 797 F.2d 390, 379 (7th Cir. 1986). In fact, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . . ." *Brooke Group v. Brown & Williamson*, 509 U.S. 209, 225 (1993). Even a dominant firm is free to choose with whom it wishes to do business without being held liable for the harm caused to the firm with which it does not transact business. *Trinko*, 2004 U.S. Lexis at *16-17.

[31] *See also Mid-South Grizzlies v. NFL*, 720 F.2d 772, 787 (3D Cir. 1983) (rejecting plaintiffs' argument that the NFL's decision to exclude them from membership caused harm to competition because it "in no way restrained them from competing for players by forming a competitive league.")

The only pertinent inquiry under antitrust law is whether the challenged restraint caused harm to competition and thus consumers. UND has demonstrated no such harm to competition.

D. The NCAA's Policy is Procompetitive because it Preserves the Nature of the Product

Finally, UND's antitrust claims would fail even if UND had managed to allege facts demonstrating that the Policy injures competition as a whole in some relevant market, because the Policy is clearly procompetitive. In applying a Rule of Reason analysis, and in assessing the procompetitive or anticompetitive effects of an alleged restraint, courts are to consider the following factors:

> To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Chicago Board of Trade, 246 U.S. at 238.

In considering those factors, it is important to recognize that the NCAA exists to promote sports as part of students' academic pursuits, and the "nature, purpose, and activities of the NCAA" thus bear upon issues such as "reasonableness" of its regulations. *Hennessey*, 564 F.2d at 1149, n.15. The "product" of intercollegiate athletics is necessarily produced by a collaborative joint venture which is entirely lawful under the rationale of *Board of Regents*, 468 U.S. at 101. The product, having been created by collaborative action, must legitimately be enhanced and protected by collaborative action through the rulemaking and standard-setting processes of the NCAA enabling "a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice – not only the choices available to sports fans but also those available to athletes – and hence can be viewed as procompetitive." *Id*. at 102. The NCAA's Policy at issue preserves the nature of intercollegiate athletics as a differentiated product from other sports. It ensures that participating

institutions do not use racial imagery and nicknames that demoralize a segment of the student-population or the public at large. It serves to provide a clean, wholesome environment for intercollegiate athletic competition which is fully integrated into academics and inclusive of all students and student-athletes. *See also NCAA v. Tarkanian*, 488 U.S. 179, 198 n.18 (1988) (describing NCAA function of "fostering amateur athletics at the college level" as "critical").[32] Therefore, the NCAA's Policy is procompetitive because it preserves the character of intercollegiate sports and enhances that core noncommercial product, with which other commercial products are associated, and thereby enhances consumer welfare.

Accordingly, UND cannot demonstrate a likelihood of success on Count III and its request for extraordinary relief should be denied.

V. UND CANNOT SHOW IRREPARABLE INJURY TO A PROTECTED INTEREST

A plaintiff cannot obtain a preliminary injunction absent a showing, by clear evidence, that he or she will suffer irreparable injury. *See Vorachek*, 461 N.W.2d 580 at 585. UND cannot make this "clear showing." *Id.* In fact, under North Dakota law, the consequences asserted by UND cannot constitute harms as a matter of law.

A. UND's Alleged Injuries Violate Established Public Policy

UND complains that its reputation and its ability to recruit student-athletes will be harmed if it is subject to the Policy's consequences.[33] According to UND, it must be able to continue exploiting Sioux Indians–without comment by the NCAA–if it is to 1) have a successful athletics

[32] Similarly, *Cal. Dental* involved restrictions on price advertising that the association claimed were justified because they encouraged disclosure and prevented false and misleading advertising. Although these justifications did not directly address price or output, the Supreme Court found "the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect …" 526 U.S. at 771.

[33] Although UND's Complaint makes much of alleged financial harms which will follow if unable to exploit the Sioux, UND was careful in its motion papers to focus only on non-monetary "injuries." To the extent UND's alleged injuries can be compensated by money damages, injunctive relief is obviously not available. Vorachek, 461 N.W.2d at 585.

program, and 2) host "lucrative" championship contests. However, it is plainly against the spirit of national public policy to permit exploitation of one group of people for the benefit of another. *See*, *e.g.*, Civil Rights Act of 1964, 42 U.S.C. §2000a *et seq.*(2006); Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (2006); Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (2006). It is also against the spirit of North Dakota's well-settled public policy, which prohibits discrimination of any kind. The North Dakota Human Rights Act provides as follows:

> It is the policy of this state to prohibit discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, status with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer; to prevent and eliminate discrimination in employment relations, *public accommodation*s, housing, *state and local government services*, and credit transactions; and to deter those who aid, abet, or induce discrimination or coerce others to discriminate.

N.D. Cent. Code § 14-02.4-01 (2005) (emphasis added). Moreover, the Supreme Court of North Dakota held as follows in *Moses v. Burleigh County*, 438 N.W.2d 186 (N.D. 1989):

> We conclude that a contract cannot excuse later unlawful discrimination. The enactment of the Human Rights Act identified important public interests in eradicating discrimination and designated remedies for violation of an individual's rights to be free of discrimination. An accepted principle of interpretation attaches a paramount purpose to such a declaration of public policy. *When an important public policy would be frustrated by a promise, the policy outweighs enforcement of the promise.*

Id. at 189-90 (emphasis added) (internal citations omitted).

In light of such clear authority regarding North Dakota's public interests, the alleged consequences from enforcement of the NCAA Policy at UND are not – and cannot be – irreparable "harms" protected by this Court. Consequences resulting from UND's continued exploitation of

Native Americans are not sympathetic and are not sufficient to support the relief requested. To hold otherwise would be to ignore the clear policies of this State's legislative assembly and highest Court.

Admittedly, the efforts of any entity or enterprise may be complicated by policies which prohibit discrimination against a protected class. However, that complication does not justify injunctive relief or exemption from non-discrimination policies. For example, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (2006), has required countless entities to modify hiring practices and make structural changes to prevent discrimination and remove barriers to access. Some of these changes have been significant, creating both economic and noneconomic costs. Similarly, non-discrimination requirements of the North Dakota Human Rights Act may frustrate the financial or other goals of an employer wishing to compensate men more than women for the same work. Despite these "harms," entities are not entitled to injunctive relief from the non-discrimination requirements. *Cf. Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("However, ordinary compliance costs are typically insufficient to constitute irreparable harm"); *American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("In addition, injury resulting from attempted compliance with government regulation ordinarily is not irreparable harm"); *A.O. Smith Corp. v. Federal Trade Comm'n*, 530 F.2d 515, 527-28 (3d Cir. 1976) ("Any time a corporation complies with a government regulation that requires corporate action, it spends money and loses profits; yet it could hardly be contended that proof of such injury, alone, would satisfy the requisite for a preliminary injunction").

Here, even if the Court accepts the "harms" identified by UND, those harms will result from a continued course of conduct by UND which offends public policy, irrespective of NCAA Policy. Consequences for continuing to exploit the Sioux, over their objection, cannot and should not be redressed by the equitable authority of this Court. Such harms cannot support entry of extraordinary

relief by this Court. Moreover, the financial, fundraising, and recruiting harms averred by UND simply cannot outweigh the broader societal interests in non-discrimination.

Finally, UND goes to great lengths to assert that its reputation will be harmed if the NCAA Policy is enforced and UND does not comply. Respectfully, any harms to UND's reputation will result not from the NCAA Policy but from UND's own decision to continue its current course of exploitation in violation of sound public policy, a decision which by itself has marked UND's national reputation.

UND identified no injury which could be protected by this Court without violating established state and federal public policy. Injunctive relief exempting UND from complying with a non-discrimination Policy would be wholly inappropriate.

B. UND's Injury, if any, is a Result of UND's Delay in Seeking Relief

It is settled law that "[h]e who invokes the jurisdiction of equity must come with clean hands and that he who has done iniquity cannot have equity." *Sorum v. Schwartz*, 411 N.W.2d 652, 655 (N.D. 1987); *see also Landers v. Biwer*, 2006 ND 109, ¶ 9, 714 N.W.2d 476 (stating that "to receive equity he must 'do equity' and must not come into court with 'unclean hands'") (internal citations omitted). The related doctrine of laches may also operate to bar a claim. Laches is "undue delay in commencing a suit which prejudices an adverse party through conditions changing during the delay." *Haugland v. City of Bismarck*, 429 N.W.2d 449, 451 (N.D. 1988).

Importantly, "a preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action." *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984); *see also Flint v. Dennison*, 336 F. Supp. 2d 1065, 1070 (D. Mont. 2004) (stating that although "delay is not alone a basis to withhold relief, it is a factor to be considered in measuring the claim of urgency"). Consequently, courts have held that delay in seeking a preliminary injunction

may be grounds for denial of such relief. *See Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) (recognizing that "delay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will face irreparable harm"); *United States v. Local 6A, Cement & Concrete Workers*, 663 F. Supp. 192, 195 (S.D.N.Y. 1986) (recognizing that six month delay in seeking a preliminary injunction is a factor in determining whether the movant will suffer irreparable injury).

Here, the NCAA Executive Committee notified UND on April 28, 2006 that its final appeal had been denied. Harrison Aff. However, UND waited until midway through the fall football season to file this lawsuit, and then demanded immediate relief. UND could have sought judicial intervention earlier but elected to wait until Homecoming weekend. By its delay, UND has now created its own emergency for purposes of post-season football games. But for its delay, UND would have no need for a preliminary injunction. Furthermore, UND has effectively deprived the NCAA of a full and fair opportunity to oppose the request for injunctive relief. UND took months to draft its motion papers, leaving the NCAA only days to assemble its opposition. UND's strategy has also demonstrated the "lack of need for speedy action." UND's delay, for its apparent strategic benefit, created a wholly unnecessary crisis and weighs against entry of the requested relief.

VI. UND CANNOT SHOW THAT ENTRY OF A MANDATORY INJUNCTION REVERSING NCAA DECISIONS IS IN THE PUBLIC INTEREST

A. Elevating Athletic and Economic Interests Over Human Rights is not in the Public Interest

The NCAA Policy at issue was adopted to address serious societal issues including exploitation of a people group, discrimination against Native Americans, civility in athletics, cultural insensitivity and deep psychological suffering of minorities. Harrison Aff., ¶ 14; UND Ex. E; UND Ex. F; UND Ex. R, Attachs. 13-15. These are subjects of great import to the public. In fact, the United States Congress, the North Dakota Legislative Assembly and the legislature of every state in

the Union have enacted numerous laws codifying and protecting these very interests. *See, e.g.,* Civil Rights Act of 1964, 42 U.S.C. §2000a *et seq*. (2006); Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. (2006); Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (2006); N.D. Cent. Code § 14-02.4-01 (2005). Virtually every private group in the nation, including the NCAA, has also taken formal steps in furtherance of these basic public interests. Among other steps, the NCAA adopted the Policy at issue to rid its championship environments of exploitation, discrimination, incivility, insensitivity and psychological harm. Harrison Aff., ¶ 15; UND Ex. E; UND Ex. F; UND Ex. R, Attachs. 13-15.

In response to these fundamental societal pillars, UND complains that complying with the NCAA Policy, or consequences for noncompliance, will harm its reputation and its recruiting efforts. UND seeks to preserve the outdated practice of entertaining and profiting one people group at the expense of another. In support of an outmoded tradition, UND effectively places its reputation and recruiting interests over basic societal issues of respect and equality. This cannot serve the public interest or further North Dakota's public policy. Indeed, assigning athletic and economic concerns more weight than human rights interests is decidedly contrary to public policy.

B. Allowing Discrimination to Continue is not in the Public Interest

Despite its stated intent to honor Native Americans, UND has actual notice of the Sioux objections. Over those objections, UND seeks to build a reputation, recruit student-athletes and protect its economic interests by using the Sioux name (complete with a stereotypic adjective). Ignoring the well-documented harms of its actions, UND comes to Court complaining that it will be unable to build its reputation or recruit student-athletes unless it is allowed to continue using the "Fighting Sioux" name without consequence. UND alleges that it will be irreparably harmed if expected to comply with a non-discrimination Policy. History will not look favorably on UND's argument.

Striking down a narrowly-limited Policy which is designed to prevent mistreatment of Native Americans is not in the public interest. Rebuffing a private Association which is attempting to rid its own events of unwelcomed racial imagery is not in the public interest. Allowing known harmful conduct to continue at a public University is not in the public interest. Disregarding North Dakota's legislative and judicial commitment to non-discrimination is not in the public interest. Allowing exploitation and discrimination to continue for any purpose is not in the public interest. Fundamental public policy does not favor entry of the requested relief.

C. The Public Interest is not Served When Native Americans Experience Discrimination

The harm to Native Americans because of nicknames and images in athletics is real. On a national scale, the research showing psychological harm is well-documented and uncontroverted. *See* UND Ex. R, Attachs. 13-15.[34] On a local Tribal scale, the overwhelming majority of Sioux Tribes articulated the hostile, dehumanizing, demeaning and degrading impact of UND's "Fighting Sioux" nickname and logo. UND Ex. R, Attachs. 3-11; NCAA Ex. 6. These are well-documented and uncontroverted. Finally, on the UND campus itself, Native American students have suffered for decades because of the university's continued use of stereotypic references. *See, e.g.*, NCAA Ex. 2; NCAA Ex. 4; NCAA Ex. 5. These are well-documented and uncontroverted.

In addition to the public harms set forth above, these real harms to Native Americans should be dispositive. No public good comes from striking down the NCAA championships Policy or granting UND an exemption from a narrowly-tailored policy of non-discrimination.

D. Interfering with Decisions of a Private Association is not in the Public Interest

The United States Supreme Court has noted "the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics." *NCAA v. Board of Regents*, 104 S.Ct. 2948, 2960 (1984). The Supreme Court also called the NCAA "the guardian of an important

[34] As noted previously, on a local scale the psychological research conducted at UND adds further weight.

American tradition . . . ." *Id*. at n. 23. But even greater than its interest in preserving the integrity of amateur athletics, the public has an interest in the freedom of individuals or institutions to associate together and operate under agreed-upon regulations.

The NCAA membership's championship rules are not arbitrary formulations designed to prevent student-athletes from competing in post-season contests. Rather, these standards represent the collective judgment of leaders in intercollegiate athletics and reflect a reasoned approach to issues regarding the environment at championship contests. Substituting the judiciary's opinion for an Association's does not serve the public interest. *See Butler v. NCAA,* 2006 WL 2398683 at *4 (D.Kan. 2006) ("It is in the public interest to allow voluntary athletic associations to determine and enforce their rules without judicial interference"); *State ex. rel. National Junior Colleges Athl. Assoc. v. Luten*, 492 S.W.2d 404 (Mo. App. 1973) (courts do not have power to usurp the function of an athletic association); *Mahan v. Oklahoma Sec. Sch. Act. Assoc.*, 652 P.2d 765, 767 (Okla. 1982) ("Surely the schools themselves should know better than any one else the rules under which they want to compete with each other in athletic events").

Moreover, significant harm could result from judicially-imposed modifications to the NCAA's policies. With over 360,000 student-athletes competing in NCAA events each year, such modifications would obviously be debilitating to the Association. Franklin Aff. The public is not served when a private Association's actions, in furtherance of its Constitution, are thwarted. Accordingly, plaintiff's requested relief does not further any public interest. Indeed, it harms the public interest and the Court should deny plaintiff's request for a mandatory injunction.

E. Creating Inconsistent Rules for Nationwide Competition is not in the Public Interest

The NCAA has more than 1,250 member institutions. Kupchella Aff., ¶ 3. There is at least one member in every state. Franklin Aff., ¶ 12. One fundamental purpose of the NCAA is to

supervise the conduct of "national athletic events under the auspices of this Association." UND Ex. A, Const. 1.2(f).

The relief UND demands would render impossible the NCAA's charge of conducting athletic events nationwide under uniform regulations and policies. Should this Court enter the relief requested by UND, member institutions in 49 states would be subject to one set of regulations and members in North Dakota would be subject to a different set. UND acknowledges, as to its own teams, that such a system would be unfair. Buning Aff., ¶ 14. Such disparity is not only against the public interest, it would violate the United States Constitution. *See* Sections VIII-IX below. Accordingly, consideration of the public interest weighs strongly against entry of extraordinary injunctive relief.

VII. UND CANNOT SHOW THAT THE BALANCE OF HARMS WEIGHS IN ITS FAVOR

The harms asserted by UND are against public policy and should be assigned minimal weight. The balance tips strongly against entry of the requested relief when those "harms" are weighed against the significant harms which a preliminary injunction would cause the NCAA, its membership and its student-athletes.

A. Harms to the NCAA

Entry of the extraordinary relief demanded by UND would harm the NCAA in at least four ways. These are relevant factors when considering a demand for injunctive relief and failure to consider them is reversible error. *See NCAA v. Lasege*, 53. S.W.3d 77, 85-86 (Ky. 2001).

First, an Order exempting UND from the Policy after all administrative appeals were denied would undermine the Association's right to draft and administer policies in furtherance of its Constitution. Harrison Aff., ¶ 20. A preliminary injunction reversing three decisions by three leadership bodies at the Association, even in anticipation of trial, would harm the NCAA's integrity

and effectiveness in maintaining recognized standards for intercollegiate athletic contests. *Id*. This is at the core of the NCAA's charge. UND Ex. A, Art. 1.2; UND Ex. J, 1 ("one of our core purposes is to govern competition in a fair, safe, equitable and sportsmanlike manner"). In contrast, the harms asserted by UND are separate from the University's basic purposes. UND's primary goal is educating students, not recruiting athletes or hosting "lucrative" athletic championships.

Second, as set forth in Section VIII below, an Association is obviously harmed when its constitutionally-protected freedom of association is infringed or compromised. This is not a remote or distantly-removed harm to the NCAA. It is one which will be evident immediately in the Division II football championship tournament. UND has no similar harm as there is no constitutional "right" to participate in post-season athletics and certainly no "right" to home-field advantage. UND's harms, even if consistent with public policy, do not rise to this level.

Third, awarding the requested relief would deprive the NCAA of authority over its own championship events. Franklin Aff., ¶ 13. At issue is an NCAA Policy governing NCAA championship contests. Yet UND would have this Court overrule and vacate the NCAA's own standards for the NCAA's own events. This is an invitation the Court should politely decline, leaving the NCAA room to organize and administer its own events in accordance with its own Constitution, without review by a judicial supercommittee. Again, UND has no comparable harm. The Policy at issue expressly protects UND's institutional autonomy and does not require UND to change its nickname. *See, e.g.*, UND Ex. F, 7 ("The Executive Committee reiterates that this decision does not mandate that North Dakota change its nickname or logo"); UND Ex. G ("Colleges and universities may adopt any mascot that they wish, as that is an institutional matter"); UND Ex. H, 2 (same); Ex. J, 2 ("choosing a sports team mascot is inherently an institutional decision"); UND Ex. P, 2 ("The decision of the Staff Review Committee does not mandate that the university change

its nickname or logo"). Thus, the harm to the NCAA, in being forced to change its Policy, outweighs UND's interest in post-season site selection.

Fourth, entry of a preliminary injunction harms the NCAA because such an Order would allow a school which employs stereotypic Native American references, absent consent by a namesake Tribe, to compete in NCAA championship contests. Franklin Aff., ¶ 13. The NCAA does not find the imagery or the exploitation acceptable and chooses not to hold its championship events on a campus with such references. *Id*. This is a deliberate and intentional decision. The requested mandatory injunction would Order that the NCAA allow a school to host or participate in NCAA championships, starting immediately, over the NCAA's objection and contrary to NCAA policies. The NCAA would be forced to hold its events on a campus which exploits Native American culture or which "induces" others to discriminate. The NCAA is harmed when a single member, through extraordinary litigation, overrules the authority of the NCAA staff, the Division II Presidents Council and the Executive Committee and brings images to NCAA championships which are unwelcomed.

B. Harms to the NCAA's Other Member Institutions

The United States Supreme Court held that the NCAA takes actions and makes decisions on behalf of its entire membership. *See NCAA v. Tarkanian*, 109 S.Ct. 454, 464 (1988). Here, the Policy was an action designed to resolve an Association-wide issue. It was adopted and applied to further the interests of the member institutions. Accordingly, not only will the NCAA itself be harmed, but its member institutions will be harmed if this Court 1) vacates the Policy, or 2) orders the NCAA to exempt UND from application of the Policy, contrary to three unanimous decisions of the NCAA governance. Harrison Aff., ¶ 21. Other member institutions field eligible teams as defined by NCAA rules and regulations. The uniform enforcement of these rules at all member institutions is necessary to preserve fair competition and the integrity of intercollegiate

championships (issues at the very center of the NCAA's mission and purpose). *See* UND Ex. J; *NCAA v. Jones,* 1 S.W.3d 83, 85 (Tex. 1999) ("The NCAA … [was] created for the stated purpose of preserving the proper balance between athletics and scholarship in intercollegiate sports"). Indeed, UND acknowledges this very harm, at least in connection with its own teams. *See* Buning Aff., ¶ 14 ("UND athletes deserve to play on a fair and balanced playing field").

It is unfair and detrimental to other NCAA members to allow UND to compete in or host NCAA championships while not complying with applicable NCAA policies. *See Butler*, 2006 WL 2398683, at *4. Failure to consider this harm to the NCAA and its members constitutes reversible error. *See*, *e.g.*, *NCAA v. Lasege*, 53 S.W.3d 77, 85-86 (Ky. 2001) (the trial court's failure to consider this harm to the NCAA and its membership "clearly mischaracterized the equities" and constituted an "inherent computational error"). The *Lasege* court also held that the NCAA "certainly has an interest in the proper application of [its] regulations . . . ." *Id.* A voluntary association is obviously harmed when its members are not permitted to draft and adopt their own regulations governing their own events. *Mahan v. Oklahoma Sec. Sch. Assoc.*, 652 P.2d 765, 767 (Okla. 1982) ("Surely the schools themselves should know better than any one else the rules under which they want to compete with each other in athletics events").

To the extent UND would host championship events pursuant to a preliminary injunction, other NCAA member institutions would be forced to compete almost immediately in a venue, or on a campus, saturated with stereotypic and exploitive Native American imagery. This would inconsistent with the member institutions' expectations under the NCAA Constitution. Harrison Aff.

Finally, other members of the NCAA which comply with all policies and regulations will be deprived of the opportunity to host championship events if UND is ordered to host those contests. Despite UND's noncompliance with the Policy, another institution will necessarily be displaced if

the NCAA is ordered to award UND a hosting opportunity. It would be unfair for that institution, which follows applicable rules, to be displaced by an institution which fails or refuses to comply. Again, this harm is immediate.

Even assuming plaintiff showed some irreparable or protected harm, the harm to the NCAA membership in being forced to allow UND to compete in NCAA championship events, contrary to NCAA Policy, is greater than any harm UND has alleged or demonstrated. Accordingly, UND's request for injunctive relief should be denied.

C. Harms to NCAA Student-Athletes

One principle in the NCAA Constitution provides that "Intercollegiate athletic programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes." UND Ex. A, Art. 2.2 (Principle of Student-Athlete Well-Being). Accordingly, the Association has an interest in the environments in which student-athletes compete. *See also id*. at Art. 31.1.

In addition to harming the Association and its members, a preliminary injunction would harm the NCAA's 360,000 student-athletes. Similar to member institutions which abide by applicable policies, student-athletes at other institutions would be forced to compete in championship events, and perhaps in championship venues, where Native Americans are exploited in violation of the NCAA Constitution. Harrison Aff., ¶ 21. The sad reality is that exploitation of Native Americans in athletics was accepted in the past. What was previously condoned, however, is no longer acceptable. The NCAA took action accordingly. NCAA student-athletes should not be forced by this Court to compete in an environment which is inconsistent with the NCAA Constitution.

VIII. ENTRY OF THE REQUESTED RELIEF WOULD VIOLATE THE NCAA'S FIRST AMENDMENT RIGHT OF ASSOCIATION

A Court Order directing a private, voluntary association how to organize its athletic championships violates the First Amendment's guarantee of free association. The United States Supreme Court has held that private associations, such as the NCAA, have a "First Amendment[] expressive associational right" protecting them from "[g]overnment actions that may unconstitutionally burden this freedom." *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2451 (2000). The Court so held because "implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id*. (internal citations omitted).[35] A Court's forced alteration of a group's rules infringes the freedom of association if the alteration impacts the group's ability to advocate public or private viewpoints. *Id*.

The NCAA carries out its fundamental purposes by administering competition rules adopted by expert representatives of member institutions. Dissenting institutions have, of course, the option of 1) abiding by NCAA rules, 2) taking those steps available to formally amend existing rules, or 3) disassociating from the NCAA. *NCAA v. Tarkanian*, 109 S. Ct. 454, 463 (1988). But, in order for the NCAA to survive, the organization must be composed of only those members that agree to abide by the rules and those rules must be consistent nationwide.

The United States Supreme Court employs a three-step analysis to determine if the forced alteration of an association's decision violates that association's expressive freedom. *See Dale*, 120

[35] See also *Hill v. NCAA*, 865 P.2d 633, 656-57 (Cal. 1994) ("Private citizens have a right, not secured to the government, to communicate and associate with one another on mutually negotiated terms and conditions."); *Hart v. Cult Awareness Network*, 16 Cal. Rptr. 2d 705, 7011-13 (Cal. Ct. App. 1993) (finding that the forced inclusion of unwanted person in group would "impede group's ability to engage in protected activities and disseminate its preferred views"); *Missouri v. Luten*, 492 S.W.2d 404, 407 (Mo. Ct. App. 1973) ("The power of a court to review the quasi-judicial actions of a voluntary association is extremely limited").

S. Ct. at 2451-52, 2456. Entry of the requested relief would violate the NCAA's First Amendment right of association under this analysis.

First, the NCAA clearly engages in expressive association. The Supreme Court "has cast a fairly wide net" in its definition of expressive activity. *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F.3d 435, 443 (3rd Cir. 2000). It is beyond peradventure that "one of NCAA's primary objectives is to promote fair competition among its member institutions by maintaining uniform standards of scholarship, sportsmanship and amateurism." *Karmanos v. Baker*, 816 F.2d 258, 259 (6th Cir. 1987). The NCAA seeks to "promote and develop educational leadership, physical fitness, athletic excellence and athletics participation." *Cole v. NCAA*, 120 F. Supp. 2d 1060, 1063 (N.D. Ga. 2000). It also seeks to "promote an atmosphere of respect for and sensitivity to the dignity of every person" (UND Ex. A, Art. 2.6) and promote events adhering to "such fundamental values as respect, fairness, civility, honesty and responsibility." (UND Ex. A, Art. 2.4).

Second, forcing the NCAA to modify policies governing its own championship events "would significantly affect" the NCAA's ability to carry out its central expressive mission. On this issue, like the first, courts "must also give deference to an association's view of what would impair its expression." *Dale*, 120 S.Ct. at 2453. "[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Id*. Yet that is what plaintiff asks of this Court. Forcing the NCAA to alter Executive Committee policies would send a message that member institutions who voluntarily associate together cannot draft and submit to regulations they believe enhance intercollegiate athletics and further the goals of the Association.

Third, judicial oversight of the NCAA's championships policy does not "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id*. at 2451 (internal citations omitted). Compelling interests to override associational freedom include such things as combating discrimination against a protected class. *See, e.g., Board of Directors of Rotary Int'l v. Duarte*, 481 U.S. 537, 547 (1987) (forced admission of women); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (same). Here, the compelling state interest and the Policy at issue are the same – combating discrimination against a protected class. Accordingly, analysis of state interests supports the Policy and vice versa. Under *Dale*, this does not warrant a fundamental intrusion on the NCAA's constitutionally protected freedom of association.

IX. ENTRY OF THE REQUESTED RELIEF WOULD UNCONSTITUTIONALLY BURDEN INTERSTATE COMMERCE

It is well-settled that local attempts to override NCAA rules run afoul of the Commerce Clause of the federal Constitution because "[c]onsistency among members must exist if an organization of this type is to thrive, or even exist." *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993). Accord, *NCAA v. Roberts*, No. TCA 94-40413-WS, 1994 WL 750585, at *1 (N.D. Fla. Nov. 8, 1994). Here, UND invokes state antitrust law and asks this Court to strike down a Policy of a national Association. Application of a state law in this manner would require the NCAA to inconsistently apply its rules from state to state. Such a result would clearly violate the Commerce Clause, especially where Congress adopted a Federal law to alleviate this very dilemma.

The Supreme Court has established a two-tiered approach for analyzing state economic regulations under the Commerce Clause. *See id*. at 337 n.14; *Miller*, 10 F.3d at 638. First, when a local law "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court] ha[s] generally struck down

the statute without further inquiry." *Healy*, 491 U.S. 324, 337 n.14; *Miller*, 10 F.3d at 638. Second, when the law "has only indirect effects on interstate commerce and regulates evenhandedly, [the Court] ha[s] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Healy*, 491 U.S. at 337 n.14; *Miller*, 10 F.3d at 638.

The *Miller* and *Roberts* courts found that modifying the NCAA's rules and regulations was a per se, or first tier, violation of the Commerce Clause. *See Miller*, 10 F.3d at 637; *Roberts*, 1994 WL 750585, at *1. The modifications "would have a profound effect on the way the NCAA enforces its rules and regulates the integrity of its products." *Miller*, 10 F.3d at 638. That is so because, as the United States Supreme Court has found, "'the integrity of the NCAA's product cannot be preserved except by mutual agreement; if an institution adopted [it's own regulations] unilaterally, its effectiveness as a competitor on the playing field might be soon be destroyed.'" *Miller*, 10 F.3d at 638-39 (*quoting NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984)).

Supplanting NCAA Policy by state law runs afoul of the Commerce Clause in two ways. *Id*. at 639. First, to maintain the uniformity of its policies and to avoid violating the local regulation, the NCAA would have to regulate its championships in every state according to the local rule. *See id*. at 639. One state's regulation "could control the regulation of the integrity of [the NCAA's] product in interstate commerce that occurs wholly outside" the state's borders. *Id*. Second, the "extraterritorial reach" of such regulation violates the Commerce Clause because of its "potential interaction or conflict" with regulations in other jurisdictions. *Id*. The Commerce Clause prevents localities from supplanting NCAA policies intended to ensure quality championships, because of the "serious risk of inconsistent obligations wrought by the extraterritorial effect" of such local regulation. *Id*. at 640.

Entry of the requested relief in this case violates the Commerce Clause even more clearly than did the laws at issue in *Miller* and *Roberts*, for it would modify the NCAA's core policies

regarding its own championship events. Specifically, the requested Injunction would override, in the State of North Dakota, a decision of the Executive Committee governing every other State in the Union. Institutions within the reach of this Court's jurisdiction would be subject to one rule – adopted by plaintiff and this Court – while all other institutions would be subject to the original policy. Given the nature of the policy at issue, this is obviously an impossible dilemma.

Subjecting the NCAA's policies to such multiple local regulation would seriously compromise the integrity of the NCAA's championships. Buning Aff., ¶ 14. As with the regulation at issue in *Miller*, the requested Injunction "seeks here to go to the heart of the NCAA and threatens to tear its heart out." *Miller*, 10 F.3d at 640 (emphasis added). There must be consistency among the NCAA's members if the NCAA is "to thrive, or even exist." *Id*. Changes at the border of every state "would as surely disrupt the NCAA as changes in train length at each state's border would disrupt a railroad." *Id*. (*citing Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945)). UND's claims thus contravene the Commerce Clause because these claims subject the NCAA to a disuniformity that threatens the NCAA's fundamental principles of diversity, non-discrimination and sportsmanship.

CONCLUSION

For the reasons stated above, the NCAA respectfully submits that UND cannot, as a matter of law, satisfy the requisite elements for entry of preliminary injunctive relief. The NCAA respectfully moves this Court to enter an Order denying UND's motion, and for such other and further relief and the Court deems just and proper.

Respectfully submitted,

/s/ Wickham Corwin
Wickham Corwin
CONMY FESTE LTD.
406 Main Avenue, Suite 200
P.O. Box 1686
Fargo, ND 58108-2686
Telephone: (701) 293-9911
Facsimile: (701) 293-3133

Linda J. Salfrank
Jonathan F. Duncan
SPENCER FANE BRITT & BROWNE LLP
1000 Walnut, Suite 1400
Kansas City, MO 64106
Telephone: (816) 474-8100
Facsimile: (816) 474-3216

Gregory L. Curtner
MILLER CANFIELD PADDOCK AND STONE, PLC
101 N. Main Street, 7th Floor
Ann Arbor, MI 48104
Telephone: (734) 663-2445
Facsimile: (734) 663-8624

ATTORNEYS FOR DEFENDANT NATIONAL COLLEGIATE ATHLETIC ASSOCIATION